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1 P R O C E E D I N G S

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3 THE CLERK: Civil action number 3:09CV00620, ePlus,
4 Inc., versus Lawson Software, Inc. Will counsel please state
5 their names for the record and identify the parties they
6 represent.

7 MR. MERRITT: Greg Merritt, Christian & Barton, for
8 ePlus.

9 MR. ROBERTSON: Scott Robertson, Goodwin Procter
10 firm. With me are my partners.

11 MR. STRAPP: Michael Strapp.

12 MS. ALBERT: Jennifer Albert.

13 MR. CARR: Dabney Carr, Troutman Sanders, for Lawson
14 Software.

15 MR. McDONALD: Good morning, Your Honor. Dan
16 McDonald, Merchant & Gould, representing Lawson Software, and
17 with me today, I'd like to introduce Kirstin Stoll-DeBell, also
18 with Merchant & Gould, also representing Lawson Software.

19 MS. STOLL-DeBELL: Good morning.

20 THE COURT: Morning. I always think it's a good idea
21 to throw counsel a curve ball. I always enjoyed it so much
22 when judges did it to me.

23 I've decided, upon further reflection, that I would
24 like to hear your views on the damages issue reflected in
25 Lawson's -- what is it, motion in limine number one? Is that

1 what it is?

2 MR. McDONALD: That's one of them, Your Honor.

3 There's one, two, and three all related to the damages issue.

4 THE COURT: I mean the settlement.

5 MR. McDONALD: That's where you want to start?

6 THE COURT: No, we'll start with the motion for
7 summary judgment, but I would like somebody to -- I'd like for
8 you to address that. I don't want a lot of -- we don't have a
9 lot of time to do this, and we've got a lot to do, so get right
10 to the point. All right, the motion for summary judgment on
11 the written description.

12 MR. McDONALD: Thank you, Your Honor. May it please
13 the Court, I have some binders with PowerPoint slides I'd like
14 to hand up.

15 THE COURT: Is that a question of law or fact?

16 MR. McDONALD: It's a question of fact, but the facts
17 are undisputed. Can I hand up the binders?

18 THE COURT: I'm sorry, it's in paragraph four of what
19 is to be argued.

20 MR. McDONALD: That was just a fast ball, not a curve
21 ball.

22 THE COURT: I don't know. Maybe that was a slider.
23 All right.

24 MR. McDONALD: Is the PowerPoint visible on the
25 screen right now for Your Honor?

1 THE COURT: Yes, but the slides are here. I use
2 them, too. Easier to read.

3 MR. McDONALD: Your Honor, the question is under
4 section 112, paragraph one of the Patent Code 35 U.S.C. which
5 is a separate and distinct requirement for claims of a patent
6 to be valid, and that is that the specification shall contain a
7 written description of an invention, and that's the invention
8 as claimed.

9 What we have here, you asked is this a question of
10 law or fact, and I think that gets to the nut of it, because I
11 think it's a key fact here when you look at ePlus's opposition
12 and what's in dispute and what's not in terms of the facts.

13 They don't dispute that the objects of the invention
14 are accurately described in our brief. It's very clear in the
15 patent. There's three or four paragraphs that talk about the
16 object of the invention, the invention described. All of them
17 involve this requisition module and purchasing module or system
18 and the transfer of information to that. They don't dispute
19 that.

20 Now, they say, well, we don't think that's material,
21 though, and if you look at paragraph 33 of their statements of
22 the facts, they say, well, the patents also state that the
23 inventions include the ability to search multiple catalogs from
24 different suppliers. They don't deny that that invention
25 description includes the purchase order and requisition

1 modules, but they say it also includes this ability to search.
2 And they say a person of ordinary skill in the art would
3 understand, based on the specification, that the system
4 includes these catalogs maintained on databases, a search
5 program, and they admit this, and modules, requisition, and
6 purchase order generation programs among its components.

7 They also admit that the search component, the aspect
8 of searching with multiple vendors is of significant if not
9 equal importance.

10 THE COURT: As I understand it, it's the -- the
11 specification has to have the written description.

12 MR. McDONALD: Right.

13 THE COURT: And the fact that the claim doesn't have
14 the same thing as the specification doesn't make it faulty
15 under 112; right or wrong?

16 MR. McDONALD: Well, the key is what part of the
17 specification are we talking about.

18 THE COURT: No. I'm talking in a more general level
19 than that. The law says the specification has to have a
20 written description.

21 MR. McDONALD: Correct.

22 THE COURT: Your argument is the claim doesn't have
23 in it what the specification has; isn't that right? Isn't that
24 your argument?

25 MR. McDONALD: Yes.

1 THE COURT: All right. Now, what part of the law
2 says that 112 is violated if the claim doesn't have the exact
3 wording of the specification in it when it is the specification
4 that has to have the written description?

5 MR. McDONALD: There is nothing --

6 THE COURT: There is no case that holds that.

7 MR. McDONALD: It doesn't require exact wording,
8 but that's not what our argument is based on.

9 THE COURT: Well, it does seem to me to be based on
10 that.

11 MR. McDONALD: When you see these cases like the
12 *Gentry Gallery* case and *ICU Medical* and so on, they look at
13 what the invention is. The day they file their application,
14 they have to do more than just describe a bunch of technology.
15 They have to go on record that day and say, here's what I'm
16 saying I invented, here's my creation, and that's what this
17 particular requirement goes to.

18 The issue of is it supported, that's a separate part
19 of 112. That's not what the paragraph one has to do with. You
20 have to say what your invention is to one of ordinary skill.
21 Then the claims have to be consistent with that. If they are
22 outside --

23 THE COURT: So if one of ordinary skill in the art
24 looks at the claim, looks at the specification and says, well,
25 yeah, that's -- what is said in the specification is reflected

1 in the claim, and that's okay according to ePlus, why isn't
2 that okay?

3 MR. McDONALD: That's not okay because the mere fact
4 that you have a description of some features in the
5 specification doesn't show that on the day the applicant filed
6 it, they were recognizing that particular group of components.

7 THE COURT: But that argument is simply a way, it
8 seems to me, of saying the specification has to be repeated
9 verbatim in the claim or substantially, and the law doesn't say
10 that, does it?

11 MR. McDONALD: No. The law does say, though, that if
12 you describe your invention, what your invention is as having a
13 set of elements, let's say A, B, and C, and you only claim A
14 and B, the claim does not include C, that's invalid for failing
15 to meet the written description requirement even though you can
16 find A in the specification and you can find B in the
17 specification.

18 You have, for example, the *Anascope* case at page
19 1,338 talking about how removing a limitation broadens the
20 claim, and that's considered classic new matter. In that case,
21 they found that because the claims did not include the
22 limitation that was described as part of the invention in the
23 specification, that that patent could not get the benefit of
24 the filing date of that earlier application. That earlier
25 application did not satisfy the written description

1 requirements.

2 You have the *Anascape*. The *Alonzo* case that ePlus
3 cites at page 1,021 talks about how while the claim may be
4 enabled, maybe your elements A and B may be enabled, but if you
5 don't claim all the elements necessary to be consistent with
6 the invention, you can still run afoul of the written
7 description requirement.

8 So the mere fact that the elements that are in the
9 claims can be found in the specification, that does not answer
10 the question. The ICU --

11 THE COURT: I don't understand the argument. If a
12 person of ordinary skill in the art can read the claim and say
13 that it's the same thing -- it does and has the elements of
14 what's in the specification, I thought the cases said that the
15 law 1123 was satisfied.

16 MR. McDONALD: Well, if that claim --

17 THE COURT: Isn't that what they say?

18 MR. McDONALD: No.

19 THE COURT: Yeah, it does.

20 MR. McDONALD: For example, the *Gentry Gallery* case
21 that even as interpreted by the cases cited -- ePlus talks
22 about how if that claim -- even if the elements, you can't find
23 some support for them in the specification, but if that claimed
24 collection of features doesn't satisfy, it's not consistent
25 with the stated purpose of the invention, so that's going

1 beyond just the description of the components of the invention
2 and specification. The Court is looking at the stated purpose
3 of the invention. It's what is this invention. That's got to
4 be part of your description in addition to just this technical
5 description.

6 If the claim is outside of that stated purpose,
7 *Gentry Gallery* and cases after *Gentry Gallery* state that that
8 claim is invalid. So here the question is, the legal question,
9 I think, is --

10 THE COURT: But isn't the issue what a person of
11 ordinary skill in the art would find in reading the claim and
12 comparing the specification? Isn't that how --

13 MR. McDONALD: I don't think I'd put it that way.

14 THE COURT: Well, how's it done? As a matter of
15 fact, how is it done? How do you see this being assessed as a
16 matter of fact? That's what the Court says it is. How is it
17 assessed?

18 MR. McDONALD: Well, I think the courts talk about
19 looking at the objects of the invention. I think that's a key
20 component, because that's essentially stating the purpose of
21 the invention.

22 THE COURT: Okay, but I don't decide that, the jury
23 does.

24 MR. McDONALD: Well, when you read the four corners
25 of the patents, what those objects are, they are unambiguous,

1 and, in fact --

2 THE COURT: Then it makes it a matter of law.

3 MR. McDONALD: It does in this case because they
4 admit that the --

5 THE COURT: That's not what I'm asking. I'm asking
6 you generally, how does this issue get presented to the jury?
7 Let me try it another way. If it's a matter of fact, how does
8 it get presented to the jury?

9 MR. McDONALD: They -- I think oftentimes it is
10 decided --

11 THE COURT: Let me put it this way: I think it's a
12 matter of fact. It's going to be presented to the jury
13 probably. How are you going to present your case to the jury?
14 Let's try it that way.

15 MR. McDONALD: We would show them the patent itself
16 where it talks about the objects of the invention and the
17 purpose of the invention requiring these purchase order and
18 requisition features.

19 THE COURT: You'd have expert testimony about what
20 one of ordinary skill in the art would think about all that,
21 wouldn't you?

22 MR. McDONALD: I don't know that they have to add
23 that much more to it.

24 THE COURT: You don't have to, but you can, can't
25 you?

1 MR. McDONALD: I don't think in this case that would
2 be appropriate. I think that the patent is very
3 self-explanatory as to what its state --

4 THE COURT: That's just rearguing the issue here.
5 You're arguing the motion *in limine*. Now I'm saying, I'm
6 asking you this: Your motion *in limine* has been denied.
7 You're going to have to try the case to the jury.

8 Are you going to have an expert come in, say, I'm one
9 of ordinary skill in the art, I know what it is, that's what
10 this means, and this is -- this element, the specification is
11 reflected in this element, that element? Are you going to have
12 an expert do that?

13 MR. McDONALD: Yeah, that's right.

14 THE COURT: You've had an expert actually review the
15 case for that purpose and prepared a report on that purpose,
16 haven't you?

17 MR. McDONALD: That's right.

18 THE COURT: So that's how it gets dealt with, and
19 then the jury decides, the decision being what's one of
20 ordinary skill in the art -- how does one of the ordinary skill
21 understand all this; is that right?

22 MR. McDONALD: If you decide it's an issue of fact.

23 THE COURT: Right. I'm not asking you to give that
24 up. I'm just trying to get all of this in one place so I can
25 understand how it works. Okay, go ahead.

1 MR. McDONALD: And so, I guess playing that out a
2 little bit, the question is, are the experts really going to
3 disagree on anything as a factual matter. That's where -- if
4 you look at paragraph 33 out of the statements of facts, and
5 they say, well, the invention includes the search program and
6 the requisition and purchase order generation programs.

7 ePlus is acknowledging that, and they are
8 acknowledging that the search program is of significant, if not
9 equal importance to the aspects relating to requisition and
10 purchase order generation. So we're all admitting that the
11 requisition and purchase order generating are important aspects
12 of the invention.

13 They are part of the stated purpose, and there's
14 really no other reasonable conclusion one could reach looking
15 at the objects of the invention as stated in the patent looking
16 at the entirety of the description. If you look at the figures
17 of the patent such as -- I'm going up ahead a little bit here
18 -- figure 1-A, which the patent says, this is a description of
19 one embodiment of the invention, 1-B is another one, but it's
20 got all these same components in a little more shorthand form,
21 but it's got the requisitioning --

22 THE COURT: Was this issue presented in the *Ariba* or
23 *SAP* litigation?

24 MR. McDONALD: I'm not sure about that.

25 THE COURT: The description issue?

1 MR. McDONALD: Maybe Mr. Robertson knows the answer
2 to that, but I don't remember seeing anything, you know -- of
3 course, the *SAP* case was a hung jury. I don't know if it was
4 presented to them or not.

5 THE COURT: All right, thank you. I'll let him
6 address that.

7 MR. McDONALD: Sure, but all the figures, one of
8 ordinary skill reading the patent, it looks to me like both
9 experts are agreeing that one of ordinary skill in the art that
10 would read this patent, the '516 patent, would say that the
11 requisition and purchase order components are part of the
12 invention. They're part of the purpose of the invention.

13 And once that is an agreed fact, once that is an
14 undisputed fact, this issue becomes an issue of law, because
15 these claims clearly, the claims that we have in this --

16 THE COURT: It doesn't become an issue of law. It
17 becomes -- I think you mean to say it becomes a matter as to
18 which there's no genuine dispute of material fact, and,
19 therefore, a reasonable jury could not return a verdict in
20 their favor; right? And so under summary judgment principles,
21 then you win as a matter of law.

22 That doesn't make it a matter of law. It means that
23 in its context as presented in this case, it can be resolved
24 because as a matter of law you win. That doesn't mean that the
25 issue is a matter of law, I don't think.

1 MR. McDONALD: That's fair. That's what I'm trying
2 to say. It could be resolved as a matter of law because the
3 facts are undisputed. So when you actually look at the
4 claims -- I can maybe go back to some of these purposes here on
5 the slide up on the screen right now. This is slide number
6 four if you are just looking at your paper version.

7 We've got one of the objects here, but all of the
8 objects have very similar descriptions specific to the
9 requisition and purchasing system components. It is an object
10 of the invention. Part of that object is to provide an
11 electronic sourcing system, method and system, that provides
12 the capability of transferring the product information to a
13 requisition/purchasing system. So maybe you're going to search
14 something, but part of the invention is transferring the
15 information to requisition and purchasing.

16 That's what you're trying to automate here with this
17 electronic system. If all you did was search a catalog and
18 then did everything else manually, you really haven't gained
19 much. It's like driving a car to the end of the driveway and
20 then walking from there. What's the point of speeding up the
21 one part of it if you don't speed up the whole thing if you've
22 got an electronic sourcing system?

23 That's what the patent says. It says that in
24 paragraph after paragraph in the summary of the invention.
25 That's further bolstered by the second bullet point here on

1 slide four which is not in the summary, it's in the detailed
2 description, and it's the only sentence in the whole patent
3 that talks about anything being an important feature of the
4 invention.

5 And it says that it's an important feature of the
6 present invention that the requisition be filled, and we've got
7 some portion of the quote missing here, but the rest of that
8 very sentence goes on to say, and the resulting requisition
9 then divided into one or more purchase orders showing that the
10 requisitioning and purchase ordering is important -- is an
11 important feature of the invention.

12 That's what one of ordinary skill would understand.
13 I don't see ePlus's expert disputing that the requisition and
14 purchase order is an important feature of the invention. So
15 once you recognize that --

16 THE COURT: Do the experts claim that one of ordinary
17 skill in the art would read the claim and understand that to be
18 the case?

19 MR. McDONALD: Yes. They put it in the context of
20 one of ordinary skill, both experts.

21 THE COURT: They say they would understand that if
22 you read the claim, one of them says if you read the claim you
23 wouldn't find the purchase and requisition system to be a part
24 of it. The other one says if you read the claim, it would be.
25 Isn't that the dichotomy that we have here?

1 MR. McDONALD: I don't think they disagree on what
2 the scope of these particular '516 claims are. I think they
3 both agree that those claims that we have at issue here don't
4 include a requisition module or purchasing module.

5 I think what they disagree on, or at least they're
6 trying to take it a step further and try to say, yeah, but
7 because the search engine is an important part of the
8 invention, it's good enough that the claims only recite the
9 catalog and search engine.

10 That argument in itself, by the way, doesn't go far
11 enough at least as to one of the claims at issue here. I'll go
12 up to that on the slide, claim nine of the '516. That's slide
13 10. This one only calls out the selection of catalogs and then
14 these sets of first and second identification codes associated
15 with the catalogs.

16 That claim in itself does not even recite a search
17 program, so when their expert says that the search program is
18 at least of equal importance to the other purchasing and
19 requisition features, that doesn't get them anywhere on claim
20 nine because claim nine doesn't describe a search engine. It
21 is only the catalog with those codes.

22 So I don't know that I can characterize what their
23 position really is specific to claim nine, but on the other
24 claims that do require a search program, I guess their position
25 is, well, it's enough to have the search program, and what I'm

1 saying is that when they admit, though, that the invention
2 aspects include requisitioning and purchase orders, that's not
3 enough. Having just the search program without those features
4 is not enough to satisfy the written description requirement.

5 THE COURT: All right, thank you.

6 MR. McDONALD: Thank you. Do you want me to go
7 through the other claims and show you each one in any detail?

8 THE COURT: I think I understand.

9 MR. McDONALD: Thank you.

10 THE COURT: Do those claims have in them a
11 requirement or mention a requisition and purchasing system?

12 MR. ROBERTSON: Claim 21 of the '516 does, Your
13 Honor.

14 THE COURT: So that one stays, and the rest of them
15 go.

16 MR. ROBERTSON: No, that's not correct, Your Honor.

17 THE COURT: Why isn't it correct?

18 MR. ROBERTSON: Because Your Honor is exactly right
19 on the law, Your Honor. There's no requirement that you need
20 to claim all the specification in a claim. The claims define
21 the invention. The specification is the written description
22 that supports and ensures that the claim subject matter is
23 supported and that the inventors had grasp of the invention.

24 THE COURT: One of you or the Court of Appeals has a
25 totally fouled up view of how you work the concept of a claim

1 against the concept of 112 which speaks in terms of the
2 specification, and I'm not willing to say, since I only have
3 one vote, that it's the Court of Appeals. So it's got to be
4 one of you two. Which one of you is it and what's wrong?

5 MR. ROBERTSON: Let me see if I can clarify, Your
6 Honor, because I think the Court of Appeals has made
7 significant strides since the *Gentry Gallery* case which Lawson
8 so heavily relies on.

9 In fact, the case has been largely discredited and
10 confined to its facts, and there are numerous cases in the
11 presentation that I would like to provide to the Court.

12 THE COURT: What does that court do up there? That
13 court has a rule, like most appellate courts, that one panel
14 can't overrule another, and it takes an *en banc* hearing, yet
15 they don't every do anything *en banc*.

16 You are asking me in several different instances
17 today to find that a decision made by a panel is changed by --
18 one of you or both of you, not just you -- by a subsequent
19 panel decision of the Court of appeals. Now, have they changed
20 the rules up there, and do they function differently than I
21 thought they did in *Rawlins*.

22 MR. ROBERTSON: Your Honor, I'd respectfully like to
23 pass on that question, if I could --

24 THE COURT: The question is, have they changed the
25 rules.

1 MR. ROBERTSON: I don't think they've changed the
2 rules.

3 THE COURT: *Rawlins* is still the law? One panel
4 can't overrule another?

5 MR. ROBERTSON: The Federal Circuit says and adheres
6 to that, though I think at times they are tested.

7 THE COURT: The judges on that panel, for example --
8 I mean on that court, on claim construction for seven, eight
9 years argued that they weren't being faithful -- in a sense
10 argued that they weren't being faithful to the way they ruled
11 and applied their own rule.

12 Are you saying that's exactly -- I've got the same
13 situation here involving the *Gentry* case, that *Gentry* is a
14 panel decision, and subsequent decisions have basically
15 overruled *Gentry*?

16 MR. ROBERTSON: I think what subsequent panels have
17 done is what's probably called red-circled the case, Your
18 Honor. It's confined to its facts in the nature of -- perhaps
19 the panel, I think, in subsequent cases overstated the case, in
20 fact, tried to define what was called the essential omitted
21 test which meant that there was an element that somehow got
22 omitted.

23 The facts of the *Gentry Gallery* case, Your Honor,
24 involved a recliner, every football fan's favorite furniture.
25 It was a dual recliner and had a console that was in the center

1 of the dual seats that reclined. That's all that was disclosed
2 in the specification. It wasn't disclosed as being anywhere
3 else, and later on, the applicant tried to claim the location
4 of the control mechanism for making the sofa recline in a
5 different position.

6 Essentially, the *Gentry Gallery* decision went a
7 little too far in rejecting the claim when it could have
8 narrowed it and said, look, that's all he disclosed, was
9 putting the control mechanism in the central console, and you
10 can't then expand and claim more than you actually disclosed in
11 your specification.

12 It's not at all what's going on here. Indeed, we're
13 disclosing less than that's in the specification. Your Honor is
14 exactly right. There's no prohibition on that, and, in fact,
15 when you ask about the facts, I don't dispute what's in the
16 specification. The specification is the specification. We
17 have a very different take on, indeed, what those facts
18 disclose, and, in fact, in many instances, even in Lawson's own
19 brief, what's described as objects of the invention or the
20 capability of the invention is that it is in the permissive
21 sense, it may include this, it might be desirable.

22 In fact, if you have in front of you, Your Honor, the
23 demonstration that was just put on, I note at page four where
24 there was quotations from the specification --

25 THE COURT: Page four of what?

1 MR. ROBERTSON: Page four of Lawson's slides.

2 THE COURT: Can somebody put that up?

3 MR. ROBERTSON: You will see, Your Honor, there's a
4 number of ellipses in here where there's been information left
5 out. I went back and actually looked at the patent, and, for
6 example, in the second bullet point, it says, it is an
7 important feature of the present invention that requisitions be
8 filled. They omitted the word "may" be filled.

9 In fact, in their brief at page 29 where they talk
10 about this ability to interface between the requisition and
11 purchasing system, this is citing to the five -- the facts that
12 recite the specifications of the '516, it indicates in the
13 background -- again, this is Lawson's brief -- that it would be
14 desirable to provide electronic sourcing system that provides a
15 means for transferring information between a
16 requisition/purchasing system that may use the results.

17 THE COURT: Now, Mr. Robertson, you agree that this
18 is a question of fact.

19 MR. ROBERTSON: Yes.

20 THE COURT: And as a question of fact, it's something
21 you have to prove; right? Of course.

22 MR. ROBERTSON: I don't think it's my burden to show
23 that the written description is satisfied.

24 THE COURT: If it's called into issue, who has the
25 burden?

1 MR. ROBERTSON: They have the burden. It's an
2 affirmative defense. There's a presumption of validity under
3 the statute.

4 THE COURT: I understand that --

5 MR. ROBERTSON: They need to prove this very issue by
6 clear and convincing evidence.

7 THE COURT: But they put it on --

8 MR. ROBERTSON: And the examiner -- I'm sorry, Your
9 Honor.

10 THE COURT: They put on the evidence. They put on
11 the evidence, and he says he's going to put on the
12 specification and the patent claim and the expert to testify
13 about it, and then what are you going to put on?

14 MR. ROBERTSON: I'm going to put on my expert, and
15 he's going to go through the specification and show where it's
16 permissive, and then you're going to instruct the jury on the
17 law, and then I'm going to argue that in each instance and
18 under the clear settled black letter law, I don't need to claim
19 fully everything that's disclosed in the specification.

20 And, Your Honor, I have some slides myself I'd like
21 to hand up to you which includes a number of the cases that
22 indicate that, and --

23 THE COURT: Do you want to hand them up?

24 MR. ROBERTSON: Excuse me, sir?

25 THE COURT: You said you wanted to hand them up. I'm

1 just not sure how this is tried. All the lore is it's a
2 question of fact. Questions of fact don't put to the jury a
3 decision on the law. I think we ought to have learned that in
4 *Markman*.

5 MR. ROBERTSON: I think that's correct, Your Honor,
6 but it's a classic duel between the experts, Your Honor, and
7 they're going to have to be persuasive, and they're going to
8 have to direct the jury to those areas of the specification
9 that we contend support, factually support our position that it
10 is disclosed in the specification and need not be fully claimed
11 in every instance.

12 THE COURT: But isn't that a question of law? Isn't
13 the way you are putting it, isn't it a question of law?

14 MR. ROBERTSON: I think it's a question of
15 application of fact to law like many of the questions that the
16 jury is going to be resolving.

17 THE COURT: So the law is, you don't have to claim
18 everything, and the fact is did they claim everything or didn't
19 they. How is it going to shake out at trial?

20 MR. ROBERTSON: Well, Your Honor, we hope to get a
21 jury instruction that follows the law faithfully and says, you
22 don't need to claim everything, and then we're going to show
23 that what is claimed in the '516 claim finds full support in
24 the specification.

25 THE COURT: That's an expert testimony.

1 MR. ROBERTSON: Yes, sir. Person who is
2 knowledgeable as to a person of ordinary skill in the art.

3 THE COURT: Right.

4 MR. ROBERTSON: I'll skip ahead, Your Honor, but, of
5 course, there are a number of post-*Gentry Gallery* cases that we
6 cite, and I apologize, Your Honor. At the time that we
7 responded to the summary judgment, there were just so many
8 issues that we couldn't devote as much time as wholesomely as
9 we would have wished to respond to these issues, but that's why
10 I put together the slide. You'll see, for example, in this
11 *Reiffin v. Microsoft* case --

12 THE COURT: What page --

13 MR. ROBERTSON: I'm on slide four, Your Honor. We
14 will have to switch back to our slide presentation.

15 THE COURT: All right. You need to put yours on now,
16 so Lawson's needs to get off. All right, they're off, you're
17 on. Go.

18 MR. McDONALD: And I have copies of the *Reiffin* case,
19 if Your Honor would like it, but I'm not going to read the
20 entire excerpt. But the same argument was made by Microsoft
21 that the patentee must include in every claim each and every
22 element --

23 THE COURT REPORTER: Excuse me, Mr. Robertson.

24 MR. ROBERTSON: I'm sorry. Each and every element
25 that was described as part of his invention whether or not the

1 element is necessary for patentability of the claim.

2 It goes on to say, that is not a correct statement of
3 the law. Cited in this *Reiffin* case, Your Honor, is, indeed,
4 an expert treatise, if you'll go to slide six, by Ernest
5 Lipscomb. That's Lawson's expert in this case.

6 Mr. Lipscomb has a treatise, *Walker on Patents*, that
7 was cited with approval in *Reiffin v. Microsoft* as actually the
8 venerable practice of claiming less than all as disclosed in
9 the specification, and here's what Lawson's expert says.

10 The claim may cover invention embracing the entire
11 process, machine, manufacture, or composition of matter which
12 is described in the specification, or it may cover such
13 subprocesses or such sub-combinations of the invention as are
14 new, useful, and patentable.

15 Indeed, after we took Mr. Lipscomb's deposition, we
16 actually checked in our library to see if we had his treatise
17 and was disappointed to find that we didn't, but I soon
18 obtained it.

19 Again, Your Honor, if you'll take a look at the next
20 slide, slide seven, again, the case law consistent with Your
21 Honor's understanding -- again, this is the *Revolution Eyewear*
22 case. I won't read the entire excerpt, but what is in bold
23 there is, "we have held that when the specification sets out
24 two different problems present in the prior art, it is
25 unnecessary for each and every claim in the patent to address

1 both problems."

2 Turning to slide eight, I just wanted to show to the
3 Court some of the cases that have now disparaged *Gentry Gallery*
4 including this *Carnegie Mellon* case which says, we agree with
5 appellant the district court erred by invalidating the claims
6 of the patent by applying the essential element test indicating
7 that in *Gentry Gallery* they did not announce any such new
8 elemental -- essential element test mandating inquiry into what
9 the inventor considers to be essential to his invention.

10 Again, Your Honor, the next slide, more authority,
11 the *Amgen* case distinguishing *Gentry Gallery* saying that the
12 accused infringer "would have us view *Gentry* as a watershed
13 case, in reliance on an isolated statement -- probably only
14 dicta --" in *Gentry*. "One sees the holding in *Gentry* for what
15 it really was: An application of the settled principle that a
16 broadly drafted claim must be fully supported by the written
17 description and drawings," and that's all.

18 Indeed, what Lawson is saying is just the opposite.
19 We didn't draft the claims broadly enough to capture the
20 requisition and purchasing order module. Not necessary for us
21 to do under the law.

22 I can go on and on, Your Honor. At claim ten,
23 there's also the *Cooper Cameron* case also limiting *Gentry*
24 *Gallery*. The fact is, Your Honor, what we have done is put
25 together a declaration that was in opposition to this where Dr.

1 Weaver goes through and shows in the specification that it
2 makes clear that searches are not mandatory -- excuse me,
3 requisition and purchase orders are not mandatory parts of the
4 invention.

5 Indeed, again, if I can just refer back to the Lawson
6 brief at page 30, which is their motion for summary judgment,
7 these are the sections they cite. It would also be desirable
8 -- not mandatory, not -- but permissive to provide a system for
9 transferring information about items selected to a requisition
10 purchasing system. It would also be desirable to provide an
11 electronic sourcing system capable of transferring the order
12 list of a desired catalog.

13 None of this speaks in terms of mandatory. It's all
14 permissive, and when one looks at the claims, there's no
15 question here that those claims that are in the '516 are fully
16 supported by the specification.

17 THE COURT: If you take the defendant's view of the
18 law, are the only three disputed legal issues set forth in your
19 slide 11 under the written description category? Isn't that
20 really what it's all about? Even under their view of the law,
21 if I were to adopt their view of the law, you'd still have to
22 have this decided. Not that I adopt their view of the law, but
23 if I do and say that -- give the appropriate guidance to the
24 jury as to their task, these are the tasks the jury would have
25 to undertake in your slide 11.

1 MR. ROBERTSON: Your Honor, I'm not --

2 THE COURT: You hang up terribly on "only," don't
3 you?

4 MR. ROBERTSON: No, sir.

5 THE COURT: You all have been in the case long enough
6 now to make "only" a real part of your vocabulary. The answer
7 to that is yes.

8 MR. ROBERTSON: I'm not certain I understand their
9 view of the law, to be honest with you, Your Honor, so if
10 that's a premise to your question --

11 THE COURT: Where do you live?

12 MR. ROBERTSON: Washington, D.C., Your Honor.

13 THE COURT: You won't be able to run for Congress,
14 but it sounds to me like you might be able to run for city
15 council up there or something. Either that or go run for the
16 Redskins and get into the dodgeball place they've got up there.
17 Do they have a dodgeball team up there?

18 MR. ROBERTSON: I'm not certain, Your Honor.

19 THE COURT: The answer to the question is -- I mean
20 the question is, if you assume their view of the law, there's
21 still these three facts, and they're the only real facts that
22 have to be decided, but they have to be decided by a jury if
23 you assume their view of the law is right. You said that.

24 MR. ROBERTSON: I'll assume their version of the law,
25 which I think is incorrect, and I think these facts need to be

1 resolved, yes, Your Honor.

2 THE COURT: And they are the only ones you would
3 resolve, right, for this issue?

4 MR. ROBERTSON: Yeah. I think I bring to bear on
5 these facts marshal evidence to prove these facts that in
6 fact --

7 THE COURT: Wrap your tongue around yes or no.

8 MR. ROBERTSON: Yes.

9 THE COURT: You prepared this slide, didn't you?

10 MR. ROBERTSON: Yes, Your Honor.

11 THE COURT: And it says exactly what I said, come on.

12 MR. ROBERTSON: Yes, Your Honor.

13 THE COURT: Okay. Thank you very much. That's it.
14 Thank you. Mr. McDonald.

15 MR. McDONALD: Your Honor, I'd like to address a
16 couple of points, one on the legal issue that *Gentry Gallery*
17 is, if it's not dead, it's been confined to solitary
18 confinement in an undisclosed location.

19 THE COURT: I think it's out at the Super Max in
20 Colorado. But you do rely on *Gentry Gallery*.

21 MR. McDONALD: Just as one of our cases, *Anascape*,
22 *ICU*, these are 2009 and 2010 cases that still apply that
23 principle. Now, maybe there's some dispute over how it was
24 applied in the *Gentry Gallery* case, but this idea that you
25 still have to describe what my invention is, not just dump a

1 user manual or a bunch of source code on the Patent Office and
2 say, hey, here's some technology I came up with. I'll figure
3 out later what the invention is, but I'll dump it all on you
4 now. We'll see what happens in the marketplace, and then I'll
5 bob and weave and then start claiming things later.

6 No, you have to go on record the day you file your
7 application with what your invention is, and I think that
8 that's the principle that is not limited to *Gentry Gallery* at
9 all. It was reaffirmed as a separate requirement from this
10 enablement requirement embanked by the Federal Circuit very
11 recently. So the doctrine is alive and well.

12 Then the question is, you know, do we have any
13 disputed facts here on it, and I think there was a little
14 dodging in terms of which --

15 THE COURT: Look, I think Minneapolis has a dodgeball
16 team, too.

17 MR. McDONALD: That's news to me, but I wouldn't be
18 surprised. That's what my kids play. But if you look at the
19 summary of the invention, they're talking about these optional
20 and the word "may." I don't see the word "may" in the summary
21 of the invention including the part that we quoted from with
22 the ellipses. The word "may" is not in there.

23 I could read the whole thing to you, but I'm looking
24 at these, at that very first one that we quoted from. "In view
25 of the foregoing, it is an object of this invention to provide

1 an electronic sourcing method and system that provides a user
2 with the capability of searching a database containing data,
3 including product vendor identification and other product
4 information relating to items available from at least two
5 vendor product catalogs" -- that's half of it, comma -- "and
6 the capability of transferring the product information for
7 desired cataloged items obtained as a result of the search to a
8 requisition purchasing system for use in generating a
9 requisition including entries for the desired catalog items."

10 There's nothing about maybe in there. There's
11 nothing about you can do it or not do it. That is an object of
12 this invention. That is a stated purpose, that it has to not
13 just search the catalogs but transfer the product information
14 obtained from the search to that requisition purchasing system.
15 I don't see where the issue of fact is. I don't see that their
16 expert disagrees about the summary of the invention.

17 Now, in a particular embodiment, they might describe,
18 well, when the customer is using it, they might use this
19 feature or they might not. That's in the big body where the
20 specification has all sorts of description of things, but that
21 doesn't say, our invention doesn't need to have transfer to a
22 purchase or requisition system. There's no place that
23 contradicts what I just read, and that's the point.

24 That's why there is a summary of the invention. It
25 tells you what the object of the game is, speaking of

1 dodgeball. It tells you what this thing is. This is where I'm
2 planting my flag is my invention, and these claims, by the way,
3 keep in mind that we've got the '516 patent here. The original
4 patent issued --

5 THE COURT: What kind of lawyer would just omit from
6 the claim the guts of the invention?

7 MR. McDONALD: When he's trying to get a broader
8 coverage for his client and grab things that they didn't
9 realize were something that could be called part of the
10 invention when they filed the application. They're going for
11 more. They're an advocate for their client, but the --

12 THE COURT: According to you, it's so obvious that
13 their attitude is wrong they ought to be guilty of malpractice
14 and guilty of fraud on the Patent Office, and the lawyer ought
15 to be -- committed a knowing a fraud and ought to go to jail.
16 That's the way you've painted the picture it seems to me, and
17 that's hard to back.

18 MR. McDONALD: Well, I think part of the issue here
19 you were talking about earlier is the law of the Federal
20 Circuit, and this *Gentry Gallery* case goes to 1998. This
21 application was filed in 1994. There was some dispute for many
22 years as to whether the written descriptions requirement really
23 was or should be a separate requirement, but now that's been
24 resolved. It is.

25 So I don't know that we're really casting aspersions.

1 I'm not trying to say anybody had evil motives, but the law has
2 become a little more clear relatively speaking. I'm not going
3 to go out on a limb here, but there is a separate --

4 THE COURT: Relative to what?

5 MR. McDONALD: Pardon?

6 THE COURT: It's become clear relative to what?

7 MR. McDONALD: There is a separate written
8 description requirement that's beyond just the specification --

9 THE COURT: In other words, the statute means what it
10 says.

11 MR. McDONALD: Yes, that's right. And so that really
12 ties into this issue of the summary of the invention. Their
13 original claims did not claim just the catalog and the catalog
14 and search engine. They had the purchase and requisition
15 modules in the original claims, all those proposed claims that
16 they had to modify to get their first patent, but when they
17 were claiming it, the day they filed the application, they did
18 not go on record saying, oh, it's just a catalog with the
19 search engine that's the invention. You don't need purchase
20 order requisition. They didn't claim it that way. That wasn't
21 until later where they added those claims that took out those
22 elements.

23 I think Mr. Robertson said something like, well,
24 maybe the claims weren't broad enough to capture the purchase
25 order and requisition modules. You have to be a little careful

1 here. When you add elements to a claim, you're narrowing it.
2 When you take out elements, you're broadening the claim,
3 because it either could or couldn't include that element that's
4 omitted now.

5 So that's what we're taking about in those cases I
6 mentioned in the first part where the Court says, you know, you
7 can't do that. Just because you've got elements A, B, and C
8 described in the original application, if you -- along with D.
9 Let's say your invention as described is A, B, C, and D. You
10 can't come back later and decide that actually my invention is
11 just A, B, and C. And you can't get by that merely because you
12 have a good description of A, B, and C individually in the
13 specification.

14 You had to have gone on record on day one saying, my
15 invention is A, B, C, and D, but it can also be A, B, and C
16 alone, and all those cases Mr. Robertson was citing and Mr.
17 Lipscomb, that's all he's saying, is that you can have those
18 sub-combinations also be part of your invention, but you still
19 have to go on record and say that sub-combination is a separate
20 invention.

21 THE COURT: All right. Thank you. The motion for
22 summary judgment on written description will be denied. There
23 are disputed issues of fact that have to be resolved in order
24 to reach the conclusion that the patent is invalid. It is the
25 burden of Lawson to prove invalidity by clear and convincing

1 evidence. The patent comes with the presumption of validity.

2 The record contains a number of places where there
3 are disputed facts acknowledged by both of the experts, and I
4 think the case law that clarifies the *Gentry* case and limits it
5 is certainly more persuasive in resolving this question.

6 That's *Revolution Eyewear, Amgen v. Hoechst, Cooper Cameron* are
7 more persuasive in the resolution of the issue.

8 The specification of the '516 patent, according to
9 Dr. Weaver, adequately describes the claimed inventions, and
10 the experts disagree on the point. Even if we take Lawson's
11 view of the law, there still are disputed issues of fact, and
12 the motion for summary judgment will be denied.

13 All right, let's take next the damages issue that are
14 reflected in number one motion *in limine* of the defendants.

15 MR. McDONALD: So, Your Honor, would you like us to
16 argue motions one, two, and three in a row?

17 THE COURT: I want to hear one right now.

18 MR. McDONALD: Motion *in limine* number one has to do
19 with the request to exclude the settlement agreements and the
20 references to the prior litigation, first and foremost the
21 *Ariba* and *SAP* litigation, and we've cited --

22 THE COURT: The groundwork, just so I understand it,
23 is the law still what I have understood it to be for some time,
24 that the construct in which a reasonable royalty is to be
25 determined is a hypothetical negotiation conducted between a

1 willing buyer and a willing seller, neither acting under
2 compulsion to either buy or sell; is that right?

3 MR. McDONALD: That's it in a nutshell, yes.

4 THE COURT: And that negotiation takes place at the
5 date of the first infringement; is that correct?

6 MR. McDONALD: Yes. Sometimes people refer to it as
7 the date just before the infringement began, but it's splitting
8 hairs.

9 THE COURT: When is that date?

10 MR. McDONALD: 2002 is when ePlus alleges the
11 infringement began.

12 THE COURT: So we have a hypothetical negotiation in
13 2002?

14 MR. McDONALD: Correct.

15 THE COURT: All right. I think everybody is in
16 agreement on that. Go ahead.

17 MR. McDONALD: Well, what we have here in the first
18 slide is -- excuse me. I forgot to bring the little clicker
19 with me, Your Honor.

20 THE COURT: Go ahead.

21 MR. McDONALD: Going back over a hundred years and
22 even some of the recent case law talks about how it's over
23 100 years of law that it is an agreement, that settlement
24 agreements, in the context under the shadow of litigation, are
25 inherently unreliable indicators of what an appropriate royalty

1 would be and should not be introduced.

2 Why is that? We've got some quotes here going back
3 121 years. The courts have recognized this in the *Rude v.*
4 *Westcott* case, that many considerations other than the value of
5 the improvements patented may induce the payment in such cases.

6 There are so many factors that go into a settlement.

7 THE COURT: That is the Supreme Court of the United
8 States, isn't it?

9 MR. McDONALD: Yes, it is.

10 THE COURT: Is that a patent case?

11 MR. McDONALD: Yes.

12 THE COURT: Is it a reasonable royalty case?

13 MR. McDONALD: Yeah, I believe --

14 THE COURT: Has it been overruled?

15 MR. McDONALD: No.

16 THE COURT: Okay. How can the Federal Circuit change
17 that rule? What authority does the Court of Appeals have to
18 take a clear case of the Supreme Court of the United States and
19 change it? They don't have any, do they?

20 MR. McDONALD: No.

21 THE COURT: But the Federal Circuit has in the Studi
22 -- how do you pronounce that?

23 MR. McDONALD: Oh, that German thing? Good luck.

24 MR. ROBERTSON: Studiengesellschaft.

25 THE COURT: Let's call it the Dart Industries case.

1 MR. McDONALD: Shall we call it the Dart case?

2 THE COURT: Yes.

3 MR. McDONALD: I agree. I don't think --

4 THE COURT: But the *Dart* case changes it, doesn't it?

5 It says, we note that *Hanson*, it's own case, does not establish
6 any rule at all post-infringement evidence is irrelevant to a
7 reasonable royalty calculation. Indeed, most recently in
8 discussing the hypothetical negotiations methodology, this
9 Court stated that, quote, the methodology encompasses...

10 flexibility because it speaks of negotiations as of the time
11 infringement began, yet permits, and often requires, a court to
12 look to evince some facts that occurred thereafter and it could
13 not have been known to or predicated or predicted by the
14 hypothetical negotiation. And then it went on and said that
15 you could consider settlement negotiations. How do you
16 harmonize that with *Rude*?

17 MR. McDONALD: The only thing is I've got on the
18 slide here a brief note on slide 17 about that case. It was a
19 nonjury case, and as far as I could tell reading it, there
20 wasn't really a question of admissibility. The license
21 agreement was kind of a weird agreement, but you're right. I
22 think the fundamental principle seems to be at odds with *Rude*
23 *v. Westcott*, but if somebody doesn't bring up admissibility as
24 a problem, I guess the Court is not there to decide whether
25 it's admissible or not.

1 I think that's about the best way I can come up with
2 to distinguish a case like *Dart*, is that the issue wasn't
3 clearly front and center where there was a motion to exclude
4 the agreement. Maybe both parties decided they wanted to let
5 it in because they thought they could get something out of it.

6 I don't know the context, but I don't think that case
7 actually said there was a motion here to exclude it, and we're
8 saying that it was appropriate to let it in dispute that.

9 THE COURT: But in *Hanson*, the Court held that those
10 settlement agreements have minimal probative value. That
11 suggests they have some and, therefore, could be considered.
12 Isn't that what they held in *Hanson*?

13 MR. McDONALD: Well, minimal probative value does
14 sound like the right language in there. I think, again,
15 arguably -- well, I guess you could say minimal isn't
16 necessarily inconsistent with the *Rude v. Westcott* case on that
17 particular point.

18 I think the overriding issue, though, is that minimal
19 relevance doesn't mean you let it in, and it doesn't mean you
20 let that dictate your analysis and, in effect, delegate the
21 jury's role here to come up with --

22 THE COURT: But if it's of minimal relevance, it's
23 relevant. That's the point. And then the issue, the analysis
24 under the Federal Rules of Evidence is whether that minimal
25 relevance is substantially outweighed by the 403 factors, and

1 you're not at that point yet. Your argument is it's not
2 relevant at all, and it looks to me like the Federal Circuit
3 has held, whether it intended to go astride or opposite, the
4 *Rude* case has held otherwise.

5 MR. McDONALD: I think in an individual case, a
6 license agreement can be so remote from the fact that it is
7 irrelevant entirely, but we're certainly not limiting ourselves
8 to that here, because that's a fine line between very little
9 relevance and none at all.

10 THE COURT: You are arguing for a bright line no
11 relevance; isn't that your premise?

12 MR. McDONALD: I think that would be appropriate, but
13 that's certainly not the only argument we're making.

14 THE COURT: I know, but that's your lead argument.
15 The lead argument is it's not relevant, period, get out of
16 here.

17 MR. McDONALD: I guess that's the lead argument.

18 THE COURT: The next argument is, if it's relevant,
19 it has marginal relevance, and its prejudicial effect is
20 substantially outweighed by the risk of confusion and delay.

21 MR. McDONALD: Yes. I think really, a lot of the
22 rulings of the cases that we have tend to rely upon both 402
23 and 403, and when you think about it, in effect they are
24 relying on 403 more almost by definition when they talk about
25 both of them --

1 THE COURT: They have to, because you have to
2 consider 402, i.e., relevance in making the analysis called for
3 by 403.

4 So what is it -- this guy calculated the royalty, a
5 running royalty, and he used the *Ariba* and *SAP* royalties, and
6 then he used three more; is that right?

7 MR. McDONALD: He referred to those other three from
8 2009, but I don't think he relied on much at all. I think he
9 was saying that those weren't --

10 THE COURT: That's sort of being a little bit
11 pregnant. You either are or you aren't. Did he or did he not
12 rely on them?

13 MR. McDONALD: I think he cites them.

14 THE COURT: Why do you all let your experts do that?
15 Why would any lawyer let an expert sit around and cite
16 something and then not rely on it? Of course, it's not your
17 report, so I'll ask Mr. Robertson is your way of handling that
18 argument, so your objection to the question is sustained.

19 MR. McDONALD: Thank you.

20 THE COURT: But I'm trying to get the facts in. Did
21 he only base the royalty then on *Ariba* and -- what do you call
22 it -- *SAP*?

23 MR. McDONALD: When you actually look at the
24 analysis, it looks to me like that's all he's relying on. I
25 mean, he mentions the other ones in there, but I don't really

1 see those affecting how he comes up with his numbers. That's
2 how I read the report. Maybe Mr. Robertson has a different
3 view.

4 THE COURT: So your motion *in limine* is, in essence,
5 one for summary judgment on damages; is that right?

6 MR. McDONALD: No.

7 THE COURT: If they can't use these, they can't use
8 any if that's all they used; right? I mean, they don't have
9 any.

10 MR. McDONALD: I think the expert's report should be
11 tossed out, but that doesn't mean we get summary judgment.
12 They still have a chance to put evidence in for damages and go
13 through the evidence that would relate to *Georgia-Pacific* other
14 than these inappropriate settlement agreements to make their
15 case.

16 THE COURT: Have they offered other evidence than the
17 expert? In other words, is somebody coming in, or are you
18 going to be, down the road, saying, well, look, we asked in the
19 interrogatories what your damages were and what the basis of
20 them was, and you didn't say that you were going to offer your
21 royalty department, your vice president, your financial
22 officer, you didn't tender any of that, and so you can't do
23 that now because you violated the rules of discovery?

24 MR. McDONALD: Yes, I would say if they're going to
25 put somebody on the witness stand to say, in my opinion, the

1 royalty should be X percent, yes, we would object to that, but
2 they can put in evidence on the *Georgia-Pacific* factors and let
3 the jury decide what that is, and as long as the jury's
4 decision is soundly based, I guess that's an alternative way to
5 do it.

6 THE COURT: My question is, have they forecast in the
7 answers to interrogatories that you inevitably put about the
8 damages, have they forecast any such evidence from any other
9 source? Neither of you cite it.

10 MR. McDONALD: I can't recall that off the top of my
11 head. I mean, we certainly didn't get a number from them
12 separate from the expert's percentage. I'm trying to think if
13 we had an answer where they said, well, here's some evidence
14 that relates to damages, and they may have given us an
15 interrogatory on that. I can't recall right now one way or the
16 other.

17 THE COURT: Okay, go ahead.

18 MR. McDONALD: So you've got this litigation that can
19 skew the results. Many cases on that, including just this year
20 in this *ResQNet* case --

21 THE COURT: Yes, but *ResQNet*, they sent the case
22 back. It was a bench trial, I understand that. They sent the
23 case back and in this elliptical statement said, consider the
24 panoply of the world, and the panoply of the world that they
25 left open included two settlement agreements and knocked out,

1 what, three or four? Three.

2 MR. McDONALD: I think they weren't necessarily
3 saying do or don't consider that. I would agree it's a totally
4 mystifying thing for what the district court is supposed to do
5 next, because they say, well, this is maybe left here, but it's
6 got a skewed result, so they're saying it's tainted evidence.

7 I don't know what -- I can't tell you what the
8 district court is supposed to do there now, and I don't think
9 that case, frankly, has a lot of guidance for us one way or the
10 other. So maybe we just go back to the Supreme Court who says
11 pretty square up it's, you know, it's tainted evidence, it
12 shouldn't be used to figure out damages. I think that's the
13 appropriate rule to apply here.

14 I don't know that you have to rely only on that
15 because these agreements are so remote from the situation here,
16 and just to hit a couple of the key points there, I mean, I've
17 got some slides that talk about a lot of the differences
18 between --

19 THE COURT: That's on a different point than whether
20 it's -- and whether it is, per se, irrelevant, it's irrelevant
21 because it is not even sufficiently analogous -- neither one of
22 these are sufficiently analogous.

23 MR. McDONALD: Right. So even if you were going to
24 accept this proposition that in some cases a settlement
25 agreement might have minimal probative value, then you have to

1 go to 403. The question is, is this case one of those cases,
2 and here, I don't think these agreements have that minimal
3 probative value.

4 I would say the situation of that hypothetical
5 negotiation is before i.nfringement begins, so this is a
6 business deal, in a sense. ePlus, Lawson get together in 2002,
7 and ePlus has got these patents, Lawson is deciding they want
8 to take a license, what is the right price. We haven't started
9 using it. The only issue is, what's your technology worth?
10 Keep the lawyers out of it, keep the judges out of it, what do
11 these businesspeople think would be the right deal?

12 That's got nothing to do with these lump sum
13 settlements reached after intensive trials in the *Ariba* and *SAP*
14 cases. *Ariba*, for goodness sakes, had a finding of willful
15 infringement. 80 percent of *Ariba*'s business was at stake with
16 the threat of an injunction, and now we're going to sit down
17 and decide what this thing is worth while they're teetering on
18 bankruptcy, and even if they thought they had some good appeal
19 issues, they may not make it that long.

20 Has that got anything to do with the hypothetical
21 negotiation in 2002 that these businesspeople at ePlus and
22 Lawson had? Absolutely not, and that's where I go from minimal
23 probative value to none when you have such an extreme
24 difference in the facts as you do here with these settlement
25 agreements set up in the way they are and the context that

1 they're in.

2 SAP as well was a hung jury. They hadn't been found
3 to willfully infringe yet, but that was part of the case. They
4 had e-mails, they had smoking guns that we don't have here that
5 showed internal SAP people were aware of the ePlus patents and
6 the issues there, and so they were at risk for that, and that
7 settled after trial number one.

8 It was probably a very expensive trial, and those
9 business executives had a bunch of lawyers in the room for that
10 one, and they'd just been paying them all a whole lot of money
11 for what amounted to merely unfinished round one.

12 THE COURT: Have you all taken in this case the
13 depositions of the people at SAP and Ariba and asked them why
14 they settled, how, what the factors were? In other words, is
15 there a fact basis for me to conclude that there was compulsion
16 in those negotiations, or do I just discern it from the facts?

17 MR. McDONALD: I think you can discern it from Mr.
18 Mangum's own report. He talks about how Ariba was sitting
19 there on the verge of bankruptcy, and the case had just
20 finished phase one with a finding of willful infringement.

21 I guess, are you asking did we get out of Ariba's
22 mouth at a deposition, did they say, we felt like we were
23 against the wall? No, we didn't get that. We actually tried
24 to get at the documents that ePlus had regarding Ariba's sales
25 and things like that. Ariba had objected to allowing it to be

1 produced, and we didn't get it from ePlus.

2 SAP allowed some materials to be produced, but ePlus
3 withheld other materials from the SAP case on the basis of
4 third-party confidentiality. This was all back and forth in
5 discovery before we understood they were really going to hang
6 their hat only on these two agreements.

7 This only came out in the Mangum report in May when
8 discovery had two weeks to go that we understood they are
9 putting all their eggs in this basket, so, certainly, had we
10 understood that earlier, we would have pursued it further, but
11 we did pursue it and were limited in what we could get.

12 We did take a deposition of SAP who was not very
13 willing to share any information about anything. They
14 barely -- they wouldn't share any sales figures with us or
15 anything like that. The witness, if you read the transcript,
16 really shows a battle in the trenches to get answers to any
17 questions.

18 THE COURT: Where is SAP located? The deposition,
19 where was it located?

20 MR. McDONALD: Kirstin took that deposition, so...

21 MS. STOLL-DeBELL: The witness was in New York, I
22 think, Your Honor, but they're everywhere.

23 THE COURT: They have courts there where the
24 deposition was? They do, don't they? They still have a court
25 system up there. You can go to a judge. Can't you even get on

1 the phone to ask to talk to me?

2 MR. McDONALD: Sure.

3 THE COURT: You all are singing a song of sixpence,
4 and you didn't come here and try to get me to rule, you didn't
5 go to a court up there, so I can't consider that too much. How
6 do you deal with their cases?

7 MR. McDONALD: Pardon?

8 THE COURT: How do you deal with the cases they cited
9 which allow -- particularly, what is -- the case that I have so
10 much trouble understanding is, the Court of Appeals, to
11 distinguish the principle that you are not under compulsion,
12 that this wasn't entered into under compulsion, that after
13 you've been found to infringe, you can consider the royalty
14 arrived at because otherwise would be to ignore the
15 infringement. I don't understand the logic of all that. Help
16 me with that case.

17 MR. McDONALD: Well, I can't help. I don't know that
18 I can help you with that. I, frankly, look at these as
19 aberrations. The cases that say keep it out, it's apples and
20 oranges. I understand those.

21 There are a couple of cases where they let it in, and
22 I think they just use different logic. Some of them, there
23 really wasn't an actual motion to exclude the license
24 agreement, so it maybe didn't get teed up just the way it is
25 right here and right now.

1 Some of them simply use a different approach where
2 they say, oh, I'm going to let it in, and they seem to be
3 ignoring Supreme Court precedent. They don't involve a willful
4 infringement here, and, you know, the prospect of a mini trial,
5 I'm just not sure all the concerns about admissibility as
6 developed in those cases, but there's a couple of cases where
7 they let it in, and there's a whole lot of cases where they
8 keep it out. That's about the best I can give you on that,
9 frankly.

10 THE COURT: Suppose we work out a way to let it in
11 but limit it, the jury's ability to understand that those came
12 in litigation? Could we do that?

13 MR. McDONALD: That just makes it worse then, because
14 they'll just think that was an arm's-length negotiation that
15 wasn't under the threat of willfulness and bankruptcy and a
16 threat of injunction, and they'll think that was just a regular
17 old business deal --

18 THE COURT: So you'd be entitled to cross-examine the
19 expert on the circumstances of the agreement; is that right?

20 MR. McDONALD: But now we're going against the
21 premise that you just described which is we're going to limit
22 the information to the jury about the context of the
23 settlement. I thought that was the hypothetical --

24 THE COURT: Your response is, I'm entitled to
25 cross-examine on that, in essence.

1 MR. McDONALD: And have a whole mini trial then about
2 what the other case was about and make this case about that
3 case. I guess that's my only option at that point, but it's a
4 very bad option, it's a very unfair option for us to face that
5 at that point.

6 THE COURT: How can I limit with limiting
7 instructions -- can't I use limiting instructions to protect
8 you from harm?

9 MR. McDONALD: Well, you know, I think the most
10 prejudicial parts of those settlements are the dollar figures.
11 The jury hears 17.5 million and they hear 37 million, that's
12 more prejudicial than anything else, and if that didn't come
13 in, then what about these things has anything to do with the
14 royalty now?

15 Again, those are lump sum deals. These were brought
16 in by Mr. Mangum. *Georgia-Pacific* factor number one, he puts
17 it under that heading. You know what that heading talks about?
18 It talks about --

19 THE COURT: Reasonable royalties.

20 MR. McDONALD: Factor number one is established
21 royalties.

22 THE COURT: Yes, established royalties.

23 MR. McDONALD: This doesn't -- or says tending to
24 prove an established royalty. In other words, I've got a
25 licensing program, and people sign up and they pay two percent.

1 I've got an established program, that's the going price, that's
2 the list price, that's the established royalty. That's what
3 factor number one has to do with.

4 It's got nothing to do with the Ariba and SAP
5 situations. Their own expert, Mr. Mangum, when he tries to run
6 all of his numbers here about the sales could be up here, the
7 sales could be down there or someplace in between because he
8 doesn't know what the sales are, he's got royalties that go
9 from 1.8 percent to 8.3 percent that are his translated
10 versions of those lump sums.

11 How can you say, when there's a multiple of four to
12 five times in that spread -- 8.3 is more than four times 1.8 --
13 how, by any stretch of the imagination, can you say that tends
14 to prove an established royalty? He can't even tell what the
15 royalty was in the one case. How can he say that this is the
16 going price now, and so --

17 THE COURT: How many royalties do they have other
18 than these?

19 MR. McDONALD: They don't have any that involve the
20 percentage except there is one that if they sold over a certain
21 amount that -- this was one of the recent ones that their
22 expert really didn't rely on. Over a certain millions of
23 dollars, they might have to pay a certain percentage. The rest
24 of them were these lump sums. The three in 2009 were up in the
25 range of between 500,000 and a million for one or two of them,

1 and I think the third one was maybe around two million or 2.4.

2 THE COURT: And then one of them had a royalty on
3 sales over 15 million or something?

4 MR. McDONALD: Who knows whether they're ever going
5 to sell anything close to that. There is no evidence one way
6 or the other on that.

7 THE COURT: I guess, get back to my original
8 question, and that is, if this motion is granted, isn't that,
9 in effect, the same thing as granting a motion for partial
10 summary judgment on the reasonable royalty aspect of damages;
11 that is, you don't get any reasonable royalty here? You either
12 have to prove lost profits -- you have to prove lost profits as
13 your damage.

14 MR. McDONALD: I think they can still prove
15 reasonable royalty. They just would have to go through those
16 factors in *Georgia-Pacific*.

17 THE COURT: Let me ask you, are you willing to live
18 by that at the trial when they start offering this evidence, or
19 are you going to pop up and say, I object because they didn't
20 offer any evidence of this?

21 I understand that conceptually what you're saying is
22 true, but that's not what you are arguing. You are really
23 arguing that they have another alternative, and I want you to
24 understand that you may be held, you probably will be held to
25 that if you object later, or are you simply arguing they

1 conceptually have another way, and if they can work it out and
2 get it in admissibly, then so what, that's what happens?

3 MR. McDONALD: I think conceptually they can. I'm
4 trying to remember what their interrogatory answers were, but I
5 think, obviously, that's of some relevance here.

6 THE COURT: What did the disclosures say, for
7 example? Did the disclosures say they were going to seek
8 damages by virtue of a reasonable royalty, and if so, what they
9 had to back that up?

10 MR. McDONALD: I believe they indicated it was going
11 to be a reasonable royalty that they sought. I can't recall
12 the details. I think they probably referred to the
13 *Georgia-Pacific* factors, but what factual information they gave
14 us, I can't recall off the top of my head right now.

15 THE COURT: Okay. All right. Thank you.

16 MR. McDONALD: Any other questions?

17 THE COURT: No. I want to hear from them.

18 Mr. Robertson, the question I have is, do you have any
19 royalties that were arrived at and available by 2002? That's
20 the date the negotiation took place here, because that's the
21 date of infringement.

22 MR. ROBERTSON: No, Your Honor, but we don't need
23 them because the *Studiengesellschaft* case makes clear --

24 THE COURT REPORTER: Because the?

25 MR. ROBERTSON: *Studiengesellschaft*.

1 THE COURT: That's what we call the *Dart* case.

2 MR. ROBERTSON: Yes, sir. The *Dart* case makes clear,
3 and as does the *Fromson* case and others, that you can employ
4 what's called a book of wisdom, and so, for example, in the
5 *Dart* case, the license at issue that was considered in the
6 settlement agreement was, indeed, ten years after the
7 hypothetical negotiation would have incurred, but Judge Rich,
8 who actually was a coauthor of the Patent Act and, therefore,
9 was fairly knowledgeable about reasonable royalties and damages
10 that could be set forth, indicated that that was still relevant
11 to inquire into when determining what the reasonable royalty
12 is.

13 Let me approach Your Honor's concern about this issue
14 about compulsion and the fact that somehow this skews the
15 litigation. I want to --

16 THE COURT: The Fourth Circuit and the Supreme Court
17 have held that. Not the Fourth Circuit, the Federal Circuit.

18 MR. ROBERTSON: It's important to understand the
19 context, Your Honor. All of this involved a negotiation, even
20 if it's hypothetical. It's still a negotiation, and even if
21 you have a willing licensor and a willing licensee, the other
22 assumption that has to be part of it is that the patents are
23 valid and infringed and the licensee knows that. That's made
24 clear. So right there, Your Honor, you have a licensee who
25 understands he's infringing a valid patent and he needs a

1 license.

2 Now, what else goes into that? The economic factors
3 that need to be concerned that are incorporated some way are
4 the *Georgia-Pacific* factors. What is the financial condition
5 of the licensee? Is it undercapitalized? Does it have a lot
6 of cash on hand? How central to its business operations is the
7 patent technology? Is he going to be out of business if he
8 can't get a license?

9 These are all economic compulsory factors, Your
10 Honor, that go into every negotiation when they sit down.
11 These factors drive the royalty rate up or down depending on
12 their impact on the licensee or the licensor. That's what's
13 going on here even in this hypothetical negotiation.

14 So in the *Dart* case, when Judge Rich was looking at
15 this, he was saying, where are we procedurally in this case?
16 Now, the *Rude v. Westcott* case, I agree, the Federal Circuit
17 can't overturn the Supreme Court even if that case is, I would
18 say, somewhat dated and probably doesn't reflect the economic
19 realities of today, but I'll leave that aside for another day.

20 What's going on in the *Dart* case is Judge Rich is
21 saying, we are now, at this stage of the case, just like the
22 hypothetical negotiation. We have a valid patent, it's known
23 to be infringed, we have a few more procedural issues to move
24 forward in the litigation, but the litigation, for all intents
25 and purposes, is over. The litigation costs that were at

1 issue, that all the cases, including the *Rude v. Westcott*, skew
2 the negotiations are sunk, they're done. Now, there's not
3 going to be any more significant litigation costs, so here we
4 are sitting at the table --

5 THE COURT: Because why?

6 MR. ROBERTSON: Because the case is at a posture
7 where the patents are valid and infringed, just --

8 THE COURT: That's silly. That's absolutely
9 ridiculous, because there's an appeal that can lie *en banc* to
10 the Federal Circuit. There's an appeal to the Supreme Court.
11 In fact, there's an appeal on that issue, on the very issue
12 that's being litigated that would lie to the Supreme Court,
13 find out if *Rude* is still good law. And that, it just seems to
14 me to be just -- the approach taken in that case makes no
15 intellectual sense in view of all of the other cases that have
16 been decided, and I don't understand it.

17 MR. ROBERTSON: That approach has been followed by a
18 number of cases, including the *Snellman* case, and a number of
19 the district court cases that actually look at this distinguish
20 the situation where you have a threat of litigation or probable
21 litigation or actual litigation early on in the case or where
22 you've proceeded to get to a point where you are at a situation
23 which is more akin to the hypothetical negotiation which is why
24 Dr. Mangum, in his expert report, was intellectually honest
25 when he relies on the *SAP* and *Ariba* case in which the

1 litigation had effectively concluded, and the three settlement
2 agreements that occurred early in this case, Verian, SciQuest,
3 and Perfect Commerce, which he cites but then doesn't rely on,
4 because he says exactly under this approach, those were done
5 early on and could have been the result, and the numbers could
6 have been skewed because of the concern of wanting to avoid the
7 litigation expenses.

8 THE COURT: The real reason he didn't include it is
9 because they were pretty low.

10 MR. ROBERTSON: No, Your Honor, I think that's not
11 true. In fact, the Verian license agreement, I think, was
12 \$500,000 at a total revenues of about six million, and so if
13 you look at that percentage, that royalty rate, that would have
14 been the highest royalty rate available. Some of the others we
15 didn't have --

16 THE COURT: He didn't consider them.

17 MR. ROBERTSON: He didn't consider it because he was
18 following the construct in *Studiengesellschaft* and also, I
19 think, the *ResQNet* case. Now, I'm not going to over argue the
20 *ResQNet* case.

21 THE COURT: Yeah, I'd leave that the --

22 MR. ROBERTSON: All I would say is they pointed out
23 these license agreements were the most reliable evidence and
24 could be considered.

25 THE COURT: You know, but why on earth -- the most

1 reliable evidence -- there's not one single rule of evidence
2 that says you let it in because it's the most reliable. It's
3 got to first pass all the tests.

4 MR. ROBERTSON: I would think if it's reliable --

5 THE COURT: That just says the best they could come
6 up with was something that was filed that weren't reliable and
7 let the most reliable one in, and then they sent it back to the
8 district court and said, now we've made up a mess, you figure
9 out what to do with it.

10 MR. ROBERTSON: I think they indicated it was most
11 reliable because they were actual license agreements of the
12 patents in suit where the other ones weren't. Just like the
13 *Ariba* and *SAP* cases are license agreements of the patents in
14 suit.

15 THE COURT: That's an implied -- according to the two
16 Texas cases, that holding in *ResQ* is an implied warrant to
17 consider the patent -- I mean infringed patent license
18 agreements, that is after the trial or part of the settlement
19 agreement.

20 MR. ROBERTSON: There were several Texas cases, Your
21 Honor. There are Texas cases that have said that the *ResQNet*
22 case permits them to consider license agreements.

23 THE COURT: One is *Tyco* and the other one is -- you
24 all cite --

25 MR. ROBERTSON: *DataTreasury*, Your Honor.

1 THE COURT: *Tyco v. E-Z-EM* and *DataTreasury*, and
2 *DataTreasury* goes so far as to believe that *ResQNet* may have
3 changed the legal landscape regarding admissibility of
4 litigation licenses which is a strange animal given that the
5 Federal Circuit follows the rule that one panel can't change
6 the rule of another.

7 MR. ROBERTSON: Again, Your Honor, I don't think you
8 need to go that far when you look at the context of
9 *Studiengesellschaft* and apply it to the cases -- excuse me, the
10 *DART* case. I'll have the spelling of that for the court
11 reporter later. And then you look at the context that these
12 settlement agreements arose.

13 Even the *SAP* case, Your Honor, where we went through
14 the jury trial and all litigation costs were sunk, and then we
15 got to a posture where we submitted it to Judge Spencer as a
16 bench trial. We did all the briefing, and we completed all the
17 briefing for that, and we were sitting there, we were actually
18 working with Judge Dohnal seeing if we could settle that case.

19 Now, why is that similar or analogous to the
20 hypothetical negotiation? Because there were two outcomes at
21 that point, Your Honor, all the litigation costs involved.
22 There was Judge Spencer would have found the patents valid and
23 infringed, or he would have either found them invalid or not
24 infringed.

25 In that latter instance, the royalty would have been

1 zero. In this instance, we didn't know what was going to
2 happen. So, in fact, Dr. Mangum says that the amount of
3 royalties that were received in the *SAP* case is conservative,
4 because if we had got the outcome of infringed and valid,
5 obviously they would have been much higher. So when he
6 estimates the royalty rate off the *SAP* case, he does so in a
7 conservative fashion, and that's why I think that is also
8 relevant to the inquiry.

9 Now, there's been some argument that this would be
10 unduly prejudicial because the numbers of 15 million and 37
11 million -- or, excuse me, 17 million and 37 million. Well,
12 that's because the royalty bases are so high in these cases.
13 The royalty bases --

14 THE COURT: Did *SAP* agree to a royalty?

15 MR. ROBERTSON: They agreed to a fully paid-up lump
16 sum agreement.

17 THE COURT: What was the basis upon which the fully
18 paid-up royalty was calculated according to the record in that
19 case?

20 MR. ROBERTSON: Well, it was negotiated out of what
21 the exposure was. It was a comprised agreement just like any
22 negotiation for a license agreement is. It also included other
23 things in it like cross licenses for patents which Dr. Mangum
24 considered because that meant that there was additional
25 consideration. So the actual monies exchanged were lower given

1 the fact that there was additional consideration.

2 There was also additional consideration in the *Ariba*
3 case because there was a cross license involved, in fact, cross
4 licenses to patents that Ariba then went out and enforced
5 against others and prevailed. So that was consideration that
6 was valuable to my client. And he takes all these into
7 account.

8 Now, to be sure, Dr. Mangum considers these as one of
9 the *Georgia-Pacific* factors, in fact factor number one, and
10 this was raised about that it was for proving established
11 royalty. Factor number one actually says, royalties received
12 by the patentee for licensing of the patent suit proving, or
13 tending to prove, an established royalty.

14 So what he did was he took those, and he looked at
15 them, and he translated them into what would be a running
16 royalty. He did that because he's only looking at damages from
17 the period of the infringement, in this case I believe 2003
18 going forward to the date of trial, not projecting forward into
19 the future as the Ariba and the SAP licenses necessarily did
20 because they were fully paid up.

21 So he factors all that in, but he goes on, and to be
22 sure, he looks at all 15 factors, and he does an analysis on
23 this. Are these license agreements important to us?
24 Absolutely. Do we want them in evidence? Yes. But we don't
25 think they're prejudicial simply because the numbers are going

1 to be high.

2 THE COURT: How is this going to get tried? Your man
3 gets on the stand and says, I arrived at this royalty rate, and
4 it's based on two royalties, license agreement that came out of
5 settlements, and then in order for Mr. McDonald to test the
6 validity of your man's assertions, he's going to be able to go
7 into a wide range of cross-examination about the litigation and
8 about what was going on, and then the jury has to sit there and
9 listen that somebody else has paid that money and thought in
10 their case that they had a risk of it being infringed -- being
11 held to be infringed.

12 In one case, the judge was considering -- all this
13 would have to come out. It would have to come out to the jury
14 here in this case. Yeah, if this comes in, he's going to be
15 able to have wide cross-examination in order to establish the
16 circumstances and the validity of the assumptions that your man
17 uses, because they are the only two he uses.

18 MR. ROBERTSON: Your Honor, they are the only two of
19 the patents in suit, because the other three he discounted
20 because of the context of the litigation, yes.

21 THE COURT: If he discounted those in context of the
22 litigation, why didn't he discount these?

23 MR. ROBERTSON: Because they were arrived at after --
24 they were arrived at a situation more analogous to where you
25 are in the hypothetical negotiation, not in the beginning of

1 the litigation where all the litigation costs are still to be
2 incurred and have not already been spent which is where we were
3 in Ariba and SAP. That's why they're more relevant than the
4 other ones.

5 Now, there are other factors he looked at, but, yes,
6 these are going to be important. I don't mind if Mr. --

7 THE COURT: My question is, how long is this going to
8 take for him to do that? How do I limit the damage to him by
9 letting in the fact that somebody else, some other case, the
10 two people thought that they had a risk of being slapped with
11 infringement? How do I limit that?

12 MR. ROBERTSON: That's what every willing licensee
13 has when he faces the hypothetical negotiation. They have to
14 assume that the patents are valid and infringed. That is the
15 law on this.

16 THE COURT: But it doesn't -- that assumes that the
17 patents are valid and would be infringed by the other person's
18 product.

19 MR. ROBERTSON: No, they are infringed by the other
20 person's product, and that's where the licensee finds himself
21 at the table --

22 THE COURT: How can he not be under compulsion if
23 he's got an infringed product?

24 MR. ROBERTSON: Lots of people who enter into
25 licenses -- in fact, most people --

1 THE COURT REPORTER: Mr. Robertson, you have to slow
2 down.

3 MR. ROBERTSON: Sorry. I apologize. Licensees
4 typically only enter into licenses, Your Honor, when they
5 believe they infringe. Otherwise, they don't enter into the
6 license. Why pay a patent owner money that you don't believe
7 they deserve?

8 So the hypothetical negotiation posits, its premise
9 is that the patents are valid and infringed. That's why
10 they're at the negotiation table. In fact, Judge Rich --

11 THE COURT: Not that they've been held to be
12 infringed but that the person who is doing the negotiation
13 assumed they are infringed for purposes of arriving at a deal.

14 MR. ROBERTSON: Yes.

15 THE COURT: But they haven't been held to be
16 infringed.

17 MR. ROBERTSON: No, but in a situation where they
18 have been held to be infringed, I would think a party like
19 Ariba understands that that's a strong likelihood, and that's
20 why they are sitting down and negotiating in that context.

21 The issue was raised about Ariba potentially being in
22 bankruptcy. That's an issue that can be brought out, but,
23 again, that's an issue that could be present in any
24 hypothetical negotiation. You can't wash away all the economic
25 factors that go into a negotiation, hypothetical or otherwise.

1 The suggestion was made that they don't have all the
2 information with respect to these issues. Well, Lawson did
3 issue subpoenas to both Ariba and SAP. We made every effort we
4 could to get them all the financial information. We reached
5 out to SAP and got their permission to turn over their
6 confidential financial information. We reached out on multiple
7 occasions to Ariba to get their -- to be permitted to turn over
8 their financial information. We did that months earlier,
9 before their subpoena back in September of 2009.

10 They never pursued the subpoena with Ariba. With
11 respect to SAP, they took a very limited deposition with
12 respect to marketing and agreed not to pursue SAP with respect
13 to a lot of this financial information, and the Court is
14 exactly right. There were mechanisms for them to go forward
15 and enforce those subpoenas. They declined to do it.

16 But we made every effort we could to give them the
17 information that was in our possession, that under the
18 protective orders signed by Judge Spencer and Judge Brinkema we
19 could provide to them. So they don't have any less information
20 than Dr. Mangum has when he put together his analysis as far as
21 the underlying financial data, and if there's any fault, I
22 think it would lie with Lawson in not pursuing the subpoenas
23 that they issued to those parties.

24 So, Your Honor, I don't know if there are any other
25 questions. I certainly think with respect to the fact that

1 these license agreements occur after the hypothetical
2 negotiation, case law makes clear they can be considered.

3 THE COURT: One case makes clear that they can be
4 considered in a strange context, and these were years -- I'm
5 sorry. I did what I don't allow to be done. I thought I put
6 this thing on my desk.

7

8 (Brief interruption.)

9

10 MR. ROBERTSON: I'm reminded by my colleague that
11 there is a Supreme Court *Sinclair* case, Your Honor, that
12 involved the application of a subsequent agreement for
13 consideration long after the fact the hypothetical negotiations
14 occurred, and I will get the cite for you. I do believe it's
15 in our briefs there, Your Honor.

16 So, the fact is, Your Honor, the evidence of these
17 licenses and of the value of the royalties is also highly
18 relevant in another context, and the Court is going to have to
19 consider that, and that is Lawson has challenged these claims
20 as being obvious, and under the Supreme Court's *Graham v. John*
21 *Deere* case, to rebut allegations of obviousness, the jury can
22 consider what are called secondary factors which have to do
23 with the commercial success of the patented technology,
24 licensing of the patented technology, the royalties enjoined by
25 the patented technology, and so we would think this would have

1 to come out because the Supreme Court says these factors must
2 be considered --

3 THE COURT: No, but you just say, do you have a
4 license and what's the amount of the license, and then we apply
5 the question, how do you convert lump sum into a royalty issue.
6 Your man has gone all over the ballpark.

7 What was in the *ResQ* case, didn't the range of
8 royalties alone suggest that it was ridiculous, the expert's
9 calculations were ridiculous, or was it another case?

10 MR. ROBERTSON: I think in the *ResQNet* case, the
11 damages expert's calculation was criticized, but I believe that
12 was because he included licenses that were not comparable.

13 THE COURT: It was criticized because it was silly.

14 MR. ROBERTSON: I think it included underlying data
15 that didn't involve the patents in suit and wasn't related to
16 comparable technology, and so when you took those license
17 agreements out of the equation, it certainly did have an impact
18 on the outcome. And would I characterize them as silly? I
19 wouldn't disagree with Your Honor on that.

20 THE COURT: All right. Thank you. We'll take a
21 20-minute recess.

22

23 (Recess taken.)

24

25 THE COURT: All right, is that it on that issue?

1 MR. ROBERTSON: For the plaintiff it is, Your Honor.
2 I gave the citations to your clerk.

3 THE COURT: All right.

4 MR. McDONALD: Your Honor, I just had a few points
5 here. One is with respect to the discovery of SAP and Ariba
6 and how we didn't take their deposition, well, the burden of
7 proof is on ePlus to prove damages. The burden of proof is on
8 them to show that these other license agreements are
9 sufficiently relevant to the damages to be brought in, and yet
10 they have their expert guess at how much sales SAP and Ariba
11 have been making since the settlements were entered. They
12 don't even go and try to get this data.

13 The burden really was on them to go to Ariba and SAP
14 and find out the real facts instead of having Mangum guess.
15 You know, we put this in a little funny context, but I'm
16 supposed to cross-examine this expert who is making these
17 guesses about what other companies are doing that aren't in
18 this case, and I'm supposed to take that discovery. Well, I
19 would have cross-examined their effort to obtain support for
20 their position, but they didn't do that.

21 THE COURT: How does that play into what we're
22 deciding today?

23 MR. McDONALD: Well, these settlement agreements have
24 to do with the prejudice versus the probative value of them.
25 They haven't shown that these -- their own briefing on the

1 marking issue.

2 We brought up that the Mangum report says SAP is
3 continuing to sell patented products that aren't marked. Their
4 own brief says -- can we put up slide number 35.

5 THE COURT: You know, one of the things that happens
6 in these cases is I get too much information, and you are in
7 too much depth for me to be able -- and I understand that when
8 you're in tight on a case, that you can stack inferences, but
9 stacking inferences are not particularly helpful here. I think
10 I've heard enough.

11 MR. McDONALD: Okay. Maybe I can make just two broad
12 points. One is, let's not forget Rule 408 of evidence which,
13 among other things, says you should not introduce a settlement
14 of a claim to indicate the value of the claim. That's exactly
15 what they're doing here, and whatever case --

16 THE COURT: That's settlement offer in the same case.

17 MR. McDONALD: Well, it's to prove the value of SAP's
18 deal. They're trying to say that's a representative deal, and
19 here's the value of that one, and, therefore, that helps them
20 in this one. They can't prove the value of the SAP deal by a
21 settlement. That's what Rule 408 says, and the same should go
22 for Ariba.

23 And then finally, this issue of what are they going
24 to do if they can't have their expert rely on it, they took
25 that risk. There's 120 years of case precedence that says

1 those settlement agreements have minimal probative value. They
2 really wanted to get them in. I can't blame them, because they
3 have nice shiny dollar figures on them, but they could have had
4 a plan B in the Mangum report that says even if that doesn't
5 come in --

6 THE COURT: There's no alternative calculation in
7 that report, is there?

8 MR. McDONALD: No, there isn't, but they could have
9 and should have done that because they knew they were taking a
10 risk here. The prejudice to us far outweighs the prejudice to
11 them because we have no control over the situation, but they
12 did.

13 THE COURT: Let me tell you how I feel about this.
14 I'm not sure what I'm going to do, but it appears as if there
15 are circumstances when the Court of Appeals, the Federal
16 Circuit, allows in these cases -- I've got to sort out --
17 allows in the post-litigation settlement agreement type
18 evidence on royalties.

19 I've got to sort the extent to which they have to be
20 analogous and deal with that question, but -- and you have to
21 deal with the temporal distance as well, and all of that may
22 very well factor into that these come out. Apart from the
23 ruling that they can be relevant, they may not be relevant
24 circumstantially, but if they are relevant circumstantially, my
25 great concern -- that is beyond a marginal relevance, and they

1 have some relevance -- is what it's going to do to the trial of
2 the case.

3 I think that most of the decisions that make the most
4 sense to me keep the evidence out under 403 in a situation such
5 as this.

6 MR. McDONALD: The SAP trial was 15 days to go
7 through that evidence, and we, obviously, wouldn't do that
8 here, but we're talking about very complex issues.

9 THE COURT: Don't make noise about that. They were
10 trying an infringement and validity and all that other stuff.
11 You would be trying the circumstances that have to do with the
12 money. So I don't think that helps you, and we'll wait and see
13 how -- I'm afraid it's going to turn this case into a damages
14 side show.

15 One of the ways to avoid that problem is to sever the
16 trial of damages but not sever it in any major sense but sever
17 it and keep all this evidence out until there's a finding of
18 infringement and then tell the jury, okay, now you've got to
19 come in and figure out the infringement -- I mean the damages.

20 I've thought that through as an alternative, and I'm
21 not sure it solves the problem here, because I think the
22 problem here is the inherent unreliability issue as to the
23 damages itself. I don't think it's so much that the evidence
24 is going to spill over, although there is some spillover
25 effect, and say, well, if one jury found that they infringed,

1 maybe these people infringed, too.

2 I think I can deal with that with limiting
3 instructions, so I'll be reflecting on all that, and if you all
4 have -- if you have anything to say on those concerns with that
5 in mind, I'll be glad to hear them now.

6 MR. McDONALD: At this point, Your Honor, that is an
7 intriguing possibility. I think all the problems still exist
8 even if you try to bifurcate it because of that inherent
9 unreliability. That's the nut of it, so I'll just leave it at
10 that.

11 THE COURT: You've got another damages-related motion
12 *in limine*, and it is which one, which number?

13 MR. McDONALD: Number two has to do with the expanded
14 royalty base, and number three has to do with Mr. Mangum's
15 expert report.

16 THE COURT: Two. Wait a minute. I'm sorry, I have
17 the wrong two. Your motion *in limine* two, isn't it?

18 MR. McDONALD: That's right. This has to do with the
19 royalty base. You've got A times B equals C is the math when
20 it comes to royalty damages. A is percentage and B is the
21 number of dollars involved, five percent times ten million or
22 whatever, and that's how you get to the actual damages.

23 This motion has to do more with that second number,
24 the actual royalty base, and there are cases out there that
25 would allow somebody to show beyond the infringing product that

1 there are other products that should be part of the royalty
2 base as well, but to get to that, you have to satisfy the
3 entire market value rule which shows that the demand for the
4 patented product substantially creates the value for the
5 unpatented product, and we've got the case law for that here.

6 The problem with that is that ePlus didn't even begin
7 to attempt to say that any products beyond the accused product
8 would be brought into the royalty base under the entire market
9 value rule, so where they're left then is everything in their
10 royalty base then has to be something that's an infringing
11 product.

12 We've got some cases like this *LaserDynamics* case,
13 and the *Cornell* case is also one that we've cited, that talks
14 about especially these computer cases, this can happen where --

15 THE COURT: Which slides are you on?

16 MR. McDONALD: I'm on 23. You have the invention is
17 on a small component, but it's part of a bigger system. That
18 happens often with respect to computer software devices. You
19 have to be very careful, and you should not include the bigger
20 product in the royalty base when the individual infringing or
21 accused product is something that could be available and sold
22 separately.

23 So that's the basic law here. You can see the last
24 cite there. If you cite to non-accused product revenues,
25 that's afoul of the entire market rule and leaves you

1 vulnerable to this prejudice, because the jury will be hearing
2 a much bigger base than they should, and that can improperly
3 taint the damages award.

4 THE COURT: I understand the principle, and I think
5 there's a great problem created here. I guess what I'm trying
6 to figure out is whether all these SKUs that you seek to be
7 excluded really fit the bill for exclusion as a factual matter,
8 and I don't see much on that, and I'm wondering if I
9 misapprehended.

10 MR. McDONALD: We listed the ones that were not
11 included within the Weaver report analysis, and if you go to
12 slide 24, we've got a summary of the products that he includes,
13 and he does cite -- they say, well, we weren't really looking
14 at modules, we were looking at something else like a product,
15 but he does, as we have in these quotes here, talk about
16 modules and applications, and these are the products that are
17 in the units that Lawson actually sells.

18 So he's got specific ones that he identified, and we
19 understand that while we disagree with infringement, that those
20 would be at least appropriate for their side of the story to
21 put that into the royalty base.

22 THE COURT: But on the four categories listed there,
23 in slide 25.

24 MR. McDONALD: 25 now we're on?

25 THE COURT: Yes. He didn't --

1 MR. McDONALD: That's right.

2 THE COURT: Is that the same as in the motion, the
3 text of the motion itself?

4 MR. McDONALD: All of these, I think, are in the text
5 of the motion itself, that's right.

6 THE COURT: Not the brief, but the first -- the
7 motion. It looks to me like they are the same, but I haven't
8 done the comparison.

9 MR. McDONALD: I was --

10 THE COURT: But they're all done with all these
11 numbers, and I don't have time to sit down and compare them.

12 MR. McDONALD: I can verify. I was pretty confident
13 on the brief. I'm not a hundred percent sure of the motion. I
14 think we were trying to be consistent with everything, but I
15 didn't double-check that particular question. I believe this
16 is the same list.

17 THE COURT: All right.

18 MR. McDONALD: So these are the ones that weren't
19 part of his equation. Just to get an understanding of what
20 we're really talking about here, I thought I'd show in slide 26
21 what's really going on here.

22 You've got some groups of suites we will call it,
23 where they will have 13 or even more different individual
24 products that are presented as a package to potential
25 customers, and we've got in these pie charts, you can see three

1 of the ones on this PPS suite, for example, are the actual
2 accused ones, the inventory control or IC, the purchase order
3 or PO, and the requisition or RQ.

4 Those are accused, and that's fine, but they've got
5 the whole revenue for the whole suite in their royalty base and
6 without any proof that the demand for the other ten modules has
7 got anything to do with demand being driven by the patented
8 product. They don't even allege that.

9 THE COURT: In other words, you are saying other ten,
10 other 12, other 13, there's no proof under the market value?

11 MR. McDONALD: Right. Those are unaccused products,
12 and there's no other reason to tie them into the royalty base.
13 And so, you know, we've got two flaws with that, I guess. One
14 is you shouldn't have accused products in there, and they might
15 say, well -- for whatever reason they might say we want to lump
16 them all together because that's how it's sold, for example.
17 Well, you know, there's a little case law that you might be
18 able to, in some circumstances, use the broader product if
19 that's the only way you can really slice the bologna there, but
20 the problem -- the second problem, though, is that they've come
21 up with a royalty that's just for the actual accused products
22 like the IC and the RQ and PO.

23 So six percent or five percent of that, they don't do
24 anything to recognize, though, if we're going to use this
25 bigger base that the infringing products comprise only a

1 fraction of, you shouldn't be using the same royalty though.

2 That's like if there's a patent on the car tires,
3 five percent patent on the car tires, fine, but if you're going
4 to try to do it on the car acknowledging that the car has
5 tires, you shouldn't apply that same number, five percent, to
6 the price of the whole car. You've got to do something to
7 address the fact that this is just a tiny slice of the overall
8 package, and they don't do anything to sever off those other
9 products, and they don't do anything to reduce the royalty.

10 THE COURT: Do they do anything to say that this is
11 an appropriate method of computation?

12 MR. McDONALD: No. Their main argument, as I looked
13 at it, I think, is that they're saying, well, this is the
14 information as you gave it to us, and that's not the case. We
15 tried to show in the record there with the exhibits that there
16 was back-and-forth in the letters where we were saying, what do
17 you want, and they told us what they wanted, and we gave them
18 what they wanted.

19 They make it sound like we were answering questions
20 of, okay, here's the products we think are infringing. We
21 weren't doing that. We don't think anything is infringing.
22 That would have been a pretty short list. We were trying to
23 answer their questions that were, what do you want and how do
24 you want it subdivided, we'll give you the data that you want,
25 ePlus, but this isn't something that we were vouching for as

1 the right list by any means, and as soon as we actually saw the
2 expert report, just within about two days after that where we
3 actually saw the accused products, we realized now we know
4 finally these are the products they're actually talking about,
5 and so we immediately generated a new revenue spreadsheet for
6 them that was specific to those particular products.

7 THE COURT: Did you give that to them before this guy
8 did his report?

9 MR. McDONALD: We didn't give it to them because we
10 got the reports at the same time. We got the Weaver report
11 identifying the products at the same time we got the damages
12 report. We just got it to them as quick as we could, and we
13 said, you know, you should use this instead basically.

14 We would have worked with them certainly to give them
15 time to change the numbers. In fact, they have supplemented
16 their numbers more than once with the quarterly information
17 coming in, and we haven't had a problem with that. We could
18 have done the same thing here to get the right numbers, not
19 just the updated numbers, but the numbers for right modules,
20 but they refused to do that.

21 THE COURT: You can do that. All that is is math, if
22 they apply math to your data you've given them.

23 MR. McDONALD: Exactly.

24 THE COURT: What you are saying is that they asked
25 what they wanted, you gave it to them, but they weren't asking

1 for the right things. After you saw they were asking for the
2 wrong things in these two reports, you then gave them the
3 underlying data for what are the accused products.

4 MR. McDONALD: That's right.

5 THE COURT: And that's what they ought to use.

6 MR. McDONALD: That's right.

7 THE COURT: Let him address that, because it sounds
8 like it's right to me. Why isn't he right?

9 MR. STRAPP: Your Honor --

10 THE COURT: You go back to square one and you do the
11 calculations, whatever you do, on the basis of the data for the
12 sales for the accused products and leave the others out.

13 MR. STRAPP: Your Honor, in August and November 2009,
14 we asked for revenues for the accused products, and we
15 specified what accused products meant. In fact, we identified
16 which products we believed were accused of infringing. This
17 was when Lawson learned about what was accused. It wasn't in
18 May 2010.

19 THE COURT: They gave you the wrong thing.

20 MR. STRAPP: Let me explain. In December 2009, we
21 exchanged correspondence, and Lawson said to ePlus, give us a
22 list of SKUs. Don't just give us a list of products, because
23 we keep track of information on revenue on an SKU basis --

24 THE COURT: So the bottom line here is that you all
25 were not communicating accurately, and so you got put in a

1 position that you used information which you now know isn't a
2 proper basis to use the calculations. Why don't you just go
3 back and redo the calculation?

4 MR. STRAPP: Because, Your Honor, in December of
5 2009, we were provided a list of 60 SKUs. Lawson took a look
6 at that list and said, we're not going to give you the revenue
7 information for those 60 SKUs even though you want it. What
8 we're going to do is call that information and give you only
9 the revenue SKUs that are relevant to the accused products.

10 In fact, in footnote one of the reply brief that
11 Lawson has filed on this motion *in limine*, Lawson admits it
12 removed SKUs that had nothing to do with the procurement
13 software at issue. So during discovery, Lawson made a cut,
14 said, we're not going to give you what you want, we're going to
15 give you a subset that's actually relevant to the accused
16 products. That's the information that's responsive to your
17 interrogatories, that's the information that's actually revenue
18 for the accused products. Go and do what you want with that
19 revenue information.

20 Our expert, relying on Lawson's representations and
21 verified interrogatory responses, calculated a royalty base and
22 then put together a damages expert report.

23 THE COURT: That doesn't square with what he's
24 saying. He's saying that they just figured out and just gave
25 you the new data as to the accused products. One of you is

1 wrong.

2 MR. STRAPP: Your Honor, we can demonstrate --

3 THE COURT: I'm going to put you in a room and let
4 you all fight until you get it right, but one of you has got to
5 be wrong. So who is wrong here?

6 MR. STRAPP: Your Honor, on December 11th, 2009, we
7 sent a letter to Lawson, and we listed -- it was a four-page
8 letter. We listed several different SKUs, and we said, we
9 think these are probably the accused SKUs, we're not sure, we
10 think these are the accused SKUs.

11 To be sure, what we do want are revenues for the
12 accused products, and we listed what those accused products
13 were. In response, Lawson didn't give us revenue information
14 for all those accused SKUs. They gave it to us for a subset.
15 We asked for about 60 SKUs. They gave us about 30. They said,
16 here are the 30 --

17 THE COURT: Look, you and I are talking at
18 cross-purposes. I don't care about the fights that you all
19 didn't resolve actively. I'm not going to make a decision on
20 the basis of who struck John in the process of coming up with
21 the wrong numbers.

22 I want to know what the right numbers are, and that's
23 what you're entitled to, and that's all you're entitled to.
24 His point, it seems to me to be correct, but I may be wrong
25 about that, that you don't satisfy the market value rule and

1 that he now has given you, albeit erroneous -- he didn't give
2 it to you before, and maybe he should have, all the data for
3 the accused products.

4 Why isn't the right remedy for you to go, recalculate
5 based on the correct data? Your answer to that has to be, at
6 least has to address at the threshold, well, they didn't
7 really -- what he's now saying he gave us isn't really the
8 revenue for the accused products.

9 MR. STRAPP: That's correct, Your Honor, and in our
10 infringement expert report where we list what the products are,
11 we have several different products. Lawson has taken those
12 products and said, here's the SKUs you accuse of infringement,
13 but in so doing, Lawson has ignored some of the products that
14 are accused of infringement in the expert report. For example,
15 on footnote one --

16 THE COURT: Some doesn't cut it.

17 MR. STRAPP: Well, the some that they ignore are the
18 some that they wish to exclude. In other words, what they wish
19 to exclude from the royalty base are products and services that
20 they say we never accused of infringement, but they're ignoring
21 our infringement expert report where we accuse those products
22 of infringement.

23 THE COURT: That isn't where you accuse. You accuse
24 them in the infringement accusations that you are required to
25 file at the beginning of the case.

1 MR. STRAPP: That's correct, Your Honor, and we did
2 it there as well. We've done it several times in this case.

3 THE COURT: That's what you're limited to.

4 MR. STRAPP: Exactly. We've done it several times in
5 this case, and what they're saying now is, we didn't know what
6 your infringement contentions were until we got your expert
7 report. They've made that argument in a motion that was
8 denied, the motion to strike portions of the Weaver expert
9 report because information in that report hadn't been disclosed
10 in the initial infringement contentions, and Your Honor found
11 that that was incorrect as a matter of law.

12 Now they're making the same argument in this motion
13 saying, we didn't know what you were really accusing of
14 infringement until we got your expert report in May 2010. So
15 all that information we gave to you in discovery that you
16 relied upon, it was false, it was incorrect, we shouldn't be
17 allowed to rely upon it, it's inadmissible --

18 THE COURT REPORTER: Sir, you need to slow down,
19 please.

20 MR. STRAPP: I apologize. It's inadmissible at trial
21 because we made a big mistake. We represented that it was
22 relevant, and it's not really relevant.

23 THE COURT: Okay. So, now they've said it is
24 relevant. Do you -- have you looked at it and said, okay, it
25 is or isn't and concluded that it is correct, something you can

1 rely on?

2 MR. STRAPP: We've concluded that it is not correct,
3 because in coming up with a list of SKUs --

4 THE COURT: You see, the problem with both of you is
5 that you argue -- you would argue, both sides, until the sun
6 sets that night was day and day was night, and I don't have
7 enough time in my life to resolve it, because neither one of
8 you tried to approach things in a reasonable fashion.

9 Now, address this question: Do you accuse of
10 infringing, and do you include in your royalty calculations,
11 the products that are sold as a package and that package
12 includes non-accused products?

13 MR. STRAPP: No, we do not. And I make that
14 representation based on the fact that we have asked only for
15 accused revenue --

16 THE COURT: No. What you asked for is not the answer
17 to that question. It's what you've got, what you've actually
18 presented in your damage calculation. That's what's relevant.

19 MR. STRAPP: Your Honor, the SKUs that are kept at
20 Lawson are an alphabet soup that's mysterious to anyone outside
21 of Lawson.

22 THE COURT: That's not a problem for me to deal with.
23 That's a problem for you to deal with, and the way you deal
24 with it is you get a deponent if they won't straighten it out,
25 and you depose the person, and if they don't answer the

1 question and you don't get it straightened out, you move to
2 strike whatever they are doing, but you don't come to the end
3 of the day and say, we couldn't find the answer.

4 MR. STRAPP: Your Honor, we believe that we found the
5 answer because that is what was represented to us in 30(b)(6)
6 sworn deposition testimony. That was what was represented to
7 us during discovery in sworn, verified interrogatory responses,
8 and it was only late in the game after discovery was over that
9 Lawson did a 360 and said, gotcha, those representations that
10 we swore to you were correct, they were actually wrong. You
11 can't rely on what we did. Everything that went on in
12 discovery was a big sham and really here are the real numbers
13 that you have to rely on.

14 We looked at those real numbers. Those don't match
15 up with the numbers that were provided in discovery, nor do
16 they match up with the accused products that are listed in our
17 initial infringement contentions as well as in our infringement
18 expert report.

19 So we say, if you want to challenge our expert
20 through cross-examination about his royalty base at trial,
21 you're welcome to do so, but we shouldn't be excluded from
22 introducing at trial evidence that Lawson represented during
23 discovery was relevant and was attributable directly to the
24 accused products.

25 THE COURT: I don't know what you all have been doing

1 in discovery if you haven't sorted this out.

2 MR. STRAPP: We thought we had sorted it out because
3 we only heard about this after the fact. In fact, we
4 understood repeatedly, there were assurances given, revenue
5 spreadsheets were provided, updates were provided to
6 interrogatory responses that said, this is the revenue you've
7 been seeking, this is the revenue that is attributable to the
8 infringing products.

9 If we thought that there was some confusion over this
10 issue, we would have pursued it further during discovery. We
11 relied upon the representations of Lawson. We took deposition
12 testimony, we took written discovery, we asked for documents,
13 we reviewed those documents, we analyzed them with our damages
14 experts.

15 After doing that thorough review, we concluded this
16 is what matches up with the accused products, and this is what
17 we will rely upon in our damages expert report, and we didn't
18 hear that that would be problematic until after the fact when
19 Lawson said, we gave you the wrong information.

20 THE COURT: All right. Thank you.

21 He paints a somewhat different picture, Mr. McDonald,
22 than you paint.

23 MR. McDONALD: Well, what I don't understand --

24 THE COURT: You make it sound like a big legal issue
25 based on a mistake. What they said is, they asked you time

1 after time, you told them time after time, you did it in
2 interrogatories, you did it in clarifying letters, you did it
3 in a 30(b)(6) deposition, and only after it was all over did
4 you say, oh, king's X, this isn't it.

5 MR. McDONALD: We put up this slide. It's in our
6 brief. There's a set of modules that Dr. Weaver, their
7 infringement expert, did not accuse of infringement. We're
8 simply trying to have their own damages expert match up with
9 their own infringement expert.

10 I guess what he's saying is, well, they don't have to
11 match up with what our infringement expert is going to say is
12 infringing because Lawson has already admitted that it's
13 infringing. I don't even understand what he's --

14 THE COURT: Yeah, if you admitted it's infringing,
15 it's infringing. They don't need an expert. If you admitted
16 it was infringing by saying, if, in response to an
17 interrogatory, give me all your infringing product, and you
18 gave it to them, then they don't even need an expert.

19 MR. McDONALD: Obviously we would have had answered
20 with a goose egg if they said, give us all the revenues for
21 your infringing products.

22 What they asked about were the accused products, and
23 we asked for clarification. He mentions the December 11th
24 letter where they listed a whole bunch of SKUs and products and
25 all that, but the bottom line is, we gave them the accused

1 stuff before they had to fish or cut bait on which ones they
2 were actually going to accuse.

3 And then we get the Weaver report, and if I
4 understand the way things are supposed to work correctly, Mr.
5 Weaver is the guy that's going to talk about what infringes,
6 and if it's not in his report, then it's not listed in his
7 report as infringing --

8 THE COURT: So the bottom line for your motion is on
9 slide 25, and that is, if Weaver did not opine as to the
10 infringement of those products in paragraphs one through four,
11 then they can't include paragraphs one through four in -- the
12 revenue from paragraphs one through four in the base for
13 calculating the royalty; right?

14 MR. McDONALD: That's correct.

15 THE COURT: Thank you. You may be seated.

16 Answer that. If your man didn't include these --
17 look at their slide 25. Have you got it?

18 MR. STRAPP: Yes, I have slide 25.

19 THE COURT: If your man didn't include those products
20 in his infringement, then how can you -- conclude they were
21 infringing products, how is it that you can use the revenue
22 from those in the royalty-based calculation?

23 MR. STRAPP: Your Honor, our infringement expert did
24 conclude that all of those products were infringing. That's
25 what's listed in his expert report.

1 THE COURT: Jesus Christ. Excuse me, but you know
2 what? You people cannot continue to do this. Either he did it
3 or he didn't. What I'm going to do is this.

4 MR. STRAPP: I think Lawson's counsel would concede
5 that those are in the infringement report.

6 THE COURT: Here's what it says. Read it. Page 25,
7 give it to him. It says that he did not opine, and you say he
8 did. Now, you know, that can't be -- I don't care whether he's
9 right or he's wrong, but the simple fact about what he opines
10 on can, in fact, be ascertained by looking at the report, and I
11 don't expect two lawyers to come in here and disagree over
12 something like that.

13 One of you is wrong, and one of you is violating
14 Rule 11, and I'm going to find out who it is. I'm going to
15 appoint somebody to do it, and we're going to post sanctions
16 for having wasted my time. I don't care who it is.

17 MR. STRAPP: Your Honor, may I provide? This is a
18 copy of the infringement expert report, and here's a copy of
19 the slide.

20 THE COURT: I'm talking to you, too, Mr. McDonald.
21 It's not just him that's in trouble here. This is what's wrong
22 with this litigation.

23 MR. STRAPP: If I could direct Your Honor's attention
24 to the footnote on the bottom of the page that's been handed up
25 to you, there's a mention there of the Lawson system foundation

1 as well as the process flow applications.

2 THE COURT: Lawson's system foundation and process
3 flow nine are prerequisite modules that must licensed with
4 modules for any of the above four appointed scenarios. Is that
5 what you're talking about?

6 MR. STRAPP: That's correct.

7 THE COURT: Does that accuse them of infringing?

8 MR. STRAPP: That's correct, Your Honor.

9 THE COURT: Where does it say that? Where in this
10 does it say that they are infringing? Is this your Weaver
11 report?

12 MR. STRAPP: Correct.

13 THE COURT: Where does Weaver in there say that it's
14 infringing?

15 MR. STRAPP: He's saying that those are prerequisite
16 to infringement because they are required in order for any of
17 the infringing modules to be run through the software that
18 Lawson sells.

19 THE COURT: But he didn't opine that these were
20 infringing. He said, you have to use these in order to use the
21 infringing products; right?

22 MR. STRAPP: That's correct, Your Honor.

23 THE COURT: That is a big difference. Don't you
24 understand that?

25 MR. STRAPP: I do understand that.

1 THE COURT: All right.

2 MR. STRAPP: If I could direct Your Honor's attention
3 as well, in the text of that same page, there's a mention of
4 the acronym EDI. You might see that.

5 THE COURT: EDI.

6 MR. STRAPP: It's the middle paragraph on the page.

7 THE COURT: You mean in the substantive paragraph.

8 MR. STRAPP: Correct, Your Honor.

9 THE COURT: Hold on, let me get it. I don't see it.

10 MR. STRAPP: Paragraph 46.

11 THE COURT: Okay, I found it in 46. I thought you
12 were talking about 45.

13 MR. STRAPP: If you refer back to slide 25 of
14 Lawson's presentation where they say that Weaver did not
15 include these modules, take a look at paragraph three. They
16 say that Weaver did not include --

17 THE COURT: Wait a minute. Paragraph three of the
18 slide?

19 MR. STRAPP: Correct. They say that Weaver did not
20 include the EDI modules. Well, there it is in his report. If
21 you take a look at paragraph one, they say that Weaver did not
22 include the LSF, the Lawson system foundation modules. Well,
23 there it is on page 15 of his report.

24 THE COURT: But, when he says in the next system --
25 next sentence, this system also constitutes an electronic -- an

1 infringing electronic sourcing system, is he saying that the
2 EDI combined with the others do; is that what you're saying?

3 MR. STRAPP: That's correct.

4 THE COURT: Let me ask you -- all right, I
5 understand.

6 Mr. McDonald, how do you get out of that? He does
7 accuse it as infringing in paragraph 46 it looks like.

8 MR. McDONALD: In three, we've got these specific
9 modules here. To say it's an EDI module doesn't tell you
10 anything. These are very specific modules that we've listed
11 here that they've been aware of. We don't see corresponding
12 information for it. Moreover, 46 I think we were --

13 THE COURT: Did you take his deposition and ask him
14 what he meant by the Lawson EDI application of the S3, S3M
15 suite?

16 MR. McDONALD: I don't recall that, but what we did
17 do, and we gave them the updated report after we got this.
18 They said it didn't include everything, so we asked them, okay,
19 can you tell us where in the Weaver report you included any of
20 these other modules, and we wanted to work that out. They
21 could have pointed something out to us. You know, we
22 understand there's a fact issue here. If they think it's in
23 there --

24 THE COURT REPORTER: Mr. McDonald.

25 THE COURT: Slow down.

1 MR. McDONALD: Okay, excuse me. We tried to find the
2 ones that correspond to the report and ask them to show us
3 where in the report -- if we missed any that should be in
4 there, show us where in the report that is. They didn't do
5 that. Maybe we can figure that out.

6 I think this is talking about a different module here
7 because it's not specific. There isn't really an EDI module,
8 per se, as in 46. I do think it's ambiguous in 46 what they
9 are saying, but if they are now clarifying what they're saying,
10 you know, we'll give them an updated report that includes a
11 couple more EDI modules, I guess. I just don't understand why
12 we couldn't get on the same page.

13 THE COURT: I don't either. Because you're not
14 talking and you're not sitting down and being straight with
15 each other. That's what's going on.

16 MR. McDONALD: The other one, certainly that's the
17 foundational product that they are not accusing of infringing,
18 so that was pretty clear.

19 THE COURT: Well, you all are going to have to figure
20 out what the reports say, what is included and what's not, and
21 you're going to have to quit playing cute little games. You
22 have to sort it out and do it right, but the bottom line is
23 that if it is not accused of infringing, it cannot be included
24 in the royalty base, period, and it's your responsibility to
25 demonstrate where in Weaver's report it actually accuses any of

1 these things.

2 We now got it at least confined to slide 25, whether
3 any of these things are accused of infringement, and if they
4 don't, that isn't coming in, and I don't know why we had to get
5 to this point in the case for you all to figure that out.
6 That's the ruling on this motion.

7 All right, you've got number three now? Is that
8 right?

9 MR. McDONALD: Yes.

10 THE COURT: Let me get it in front of me. Isn't this
11 just the corollary of number one?

12 MR. McDONALD: It's very closely related to number
13 one.

14 THE COURT: What is the difference? Obviously, if
15 they're inadmissible, he can't testify.

16 MR. McDONALD: That's right. So then it's a short
17 hearing. If the license agreements don't come in, I think his
18 whole opinion falls. The question is, even if the opinions --
19 excuse me, the settlement licenses do come into evidence, did
20 he do what you need to do under *Daubert* and Rule 702, apply the
21 right methodology and use the actual facts of the case in an
22 admissible way to get to the royalty that he opines on in this
23 case.

24 That is the additional issue, I think, that's
25 relevant here. That's where it comes back into play, again

1 related to the other issues that we talked about regarding the
2 first motion, but he's speculating on the sales of Ariba and
3 SAP --

4 THE COURT: Is this all based on the speculative
5 nature of the SAP and Ariba sales figures? Is that what this
6 is all about?

7 MR. McDONALD: That's probably the biggest part of
8 it, I would say.

9 THE COURT: What else is the other part of it?

10 MR. McDONALD: His failure to show the factual
11 similarities, like do those products even come within the
12 claims, are they at a higher risk of infringement because --
13 for Ariba, for example, they actually sell products that give
14 you a selection of catalogs. It looks a lot more like what the
15 patent is actually taking about in contrast to what Lawson does
16 with their single item master, and SAP has also got products
17 where they actually have this ability where they have graphics
18 that show separate catalogs that you can have access to which
19 is different.

20 He hasn't really gone to the underlying facts to show
21 the similarities of the products. He hasn't looked at the
22 profitability. Lawson is a smaller player compared to a
23 company like SAP and historically has had a significantly lower
24 profit margin. Mangum doesn't even talk about that. Profits
25 are very important in the *Georgia-Pacific* analysis.

1 He doesn't connect those dots at all here to show the
2 relevance, so there's a number of aspects of it beyond just the
3 admissibility of the settlement that are flaws --

4 THE COURT: What else?

5 MR. McDONALD: -- in his presentation.

6 THE COURT: He improperly arrived on settlement.
7 Speculation as to the SAP and Ariba sales. He doesn't rely on
8 the *Georgia-Pacific* factor of assessing the capitalization and
9 profitability of the alleged infringer which would be something
10 that would lead to the establishment of an agreed royalty.
11 What else?

12 MR. McDONALD: What else is that he adjusts the
13 number, he's got this 1.8 percent to 8.3 percent range. He
14 then indicates that there's a range -- the equivalent is a
15 range from 2.5 percent -- let me go to slide 37 so you can see
16 what I'm talking about.

17 We've got a quote here from his report that he's got
18 some sort of rate that he distills from SAP and Ariba of 2.5 to
19 something in excess of 3.7 percent, and then he says the
20 royalty should be five to six percent. He's got some
21 *Georgia-Pacific* analysis where he says, well, some of these
22 factors, I think, should make the number go up, but he doesn't
23 explain why it goes up or why wouldn't it go from 3.7 to 3.8.

24 There's no analysis at all that would indicate how do
25 you go from something between 2.5 and 3.7 to five to six.

1 There's simply no justification for it. You see no math, no
2 quantitative or qualitative analysis other than it should be
3 more than this kind of equivalent I found from the other ones.
4 That's a big hole in his analysis that does not satisfy the
5 *Daubert* requirement.

6 THE COURT: Are you objecting to the fact that he
7 goes from 2.5 to 3.7 to a derived rate of five to six percent,
8 or are you objecting that it goes from 2.5 to -- a range of 3.7
9 when he says that the range of royalty is 1.8 to 8.3 percent?

10 MR. McDONALD: I don't have a problem with him saying
11 I'm going to pick this range of 2.5 to 3.7 as representing
12 Ariba and SAP. You know, if you accepted sales figures, I
13 mean, obviously those numbers all stand or fall with
14 speculative sales figures, but this is a separate issue from
15 disputing the sales figures.

16 THE COURT: I understand that. What I'm asking you
17 is, is the -- he extrapolates and he projects, and that's an
18 acceptable method in mathematics, and he takes a base of 2.5 or
19 3.7 from SAP and Ariba, and then he extends it to get a derived
20 number of 5.6 -- excuse me, between five and six on slide 37,
21 and then he gets -- he again states 1.8 to 8.3 overall which is
22 reflected on 31. Which of those are you objecting to him
23 making the extrapolation from 2.5-3.7?

24 MR. McDONALD: I'm objecting from that starting
25 point. I'll accept that starting point.

1 THE COURT: Object to the starting point to begin
2 with because the sales are speculative, but if you accept -- if
3 you get over that, then you accept those ranges. Then the next
4 question is, what are you objecting to?

5 MR. McDONALD: What I'm objecting to is how do you
6 get to the range of five to six percent from that 2.5 to --

7 THE COURT: So it's not explained.

8 MR. McDONALD: That's right. He simply says, it
9 should be more than SAP and Ariba, but there's no analytical
10 approach to how much more.

11 THE COURT: All right.

12 MR. McDONALD: That's the problem. The last point
13 also is mentioned on this slide, the other motion we were just
14 talking about regarding the royalty base, that he's got an
15 improper base, and that, again, is affected by that issue. The
16 other issue that had to do with the royalty base --

17 THE COURT: That is the SKU issue.

18 MR. McDONALD: Well, that was one part of the base.
19 Of the other part of the base was the service revenues which
20 include service revenues for all the different Lawson products,
21 and so it's the same sort of issue. They haven't shown an
22 entire market value sort of demand for all of those services.
23 They want them all in there, and maybe they'll say, well, it's
24 because Lawson just does services by customers, not by product,
25 which is true like every other software company. That's how we

1 measure it.

2 But the problem, again, is they've done nothing to
3 alter the royalty rate to acknowledge the fact that this is now
4 based on servicing the whole car instead of servicing just the
5 tires.

6 THE COURT: All right.

7 MR. McDONALD: Thank you.

8 THE COURT: Who's going to address this?

9 MR. ROBERTSON: I am going to, Your Honor.

10 THE COURT: The first thing is, give me this guy's
11 report. Where is it? When I looked at it, excerpts of it, I
12 thought it sounded like he did guess as to what the SAP and
13 Ariba sales figures are. Where is it that he decides what the
14 SAP sales figures are, and what does he say about it, and
15 Ariba?

16 MR. ROBERTSON: I'm going to locate it for you right
17 now.

18 THE COURT: It's that simple, and you all ought to
19 have known that. As a lawyer getting this, you should have
20 said, oh, my Lord, what he's done when you get a report like
21 that. What page is it where he tells us how he arrived at the
22 Ariba and SAP sales figures?

23 MR. ROBERTSON: He begins at the bottom of page ten
24 where he's citing to the Ariba and SAP figures, and --

25 THE COURT: Where does he say -- what part of that

1 does he say about the sales, what they actually were, because
2 that's what he uses to make the conversion.

3 MR. ROBERTSON: Your Honor, it's in the appendix in
4 the back.

5 THE COURT: Where is it?

6 MR. ROBERTSON: Your Honor, he obtained the SAP sales
7 figures from the SAP litigation because we produced the SAP
8 expert reports that referenced all those sales figures --

9 THE COURT: Where is it?

10 MR. ROBERTSON: It's in an appendix, Your Honor,
11 that, unfortunately, is not attached to this draft of the
12 report. Do we have the appendix available?

13 Your Honor, I assume we're going to take a lunch
14 break. I'm sure we have the appendix back at the hotel, and I
15 will bring it back --

16 THE COURT: I'm going to tell you right now that if,
17 as they allege, and I can't tell that from what I've got, and
18 your all's papers don't demonstrate it, if it's speculative,
19 those calculations are out, period, for that reason alone. And
20 that means he's got to have actual sales figures and know what
21 those sales are to apply to -- in the calculation, and if he
22 doesn't, it's out and it's that simple.

23 MR. ROBERTSON: Let me locate that for you during --

24 THE COURT: It's your burden to show me exactly where
25 he does -- I want to know what the actual sales figures are and

1 see where he actually multiplied them out so I can see how he
2 did it.

3 MR. ROBERTSON: Understood.

4 THE COURT: I think your man is playing right fast
5 and loose from what I'm able to read with the numbers. It's
6 because he doesn't have them, and it's your burden to show
7 that. All right. Also, where in this report does he explain
8 how he gets from 2.5, a range of 2.5 to 3.7 to 5.6? Where does
9 that appear in this report?

10 MR. ROBERTSON: Your Honor, he explains the 2.5 to
11 3.7 --

12 THE COURT: Where?

13 MR. ROBERTSON: He takes into account all the other
14 15 factors.

15 THE COURT: Where? I'm sorry, Mr. Robertson, but I'm
16 beyond accepting anybody's statements here. I've got to see
17 it. I've got to put eyes on it, because you all just have a
18 way of drawing, taking a kernel of truth and drawing it into a
19 very, very extrapolated point, both sides.

20 MR. ROBERTSON: At page 29 of the report. If we can
21 switch to our slides.

22 THE COURT: Page 29.

23 MR. ROBERTSON: Yes, under reasonable royalty rate,
24 when he looked at Ariba and SAP agreements, Your Honor, that's
25 how -- it was one factor. It's factor one of 15 factors. You

1 see there he concludes, in summary, the market measures
2 indicate applicable running royalty rates ranging from 2.5 to
3 rates in excess of 3.7 for those rights to the patents in suit.
4 That was for the Ariba and SAP.

5 Then he says, I took into account, and there's
6 21 pages of discussion of these *Georgia-Pacific* factors,
7 factors five, six, and eight through 13 which indicate a higher
8 royalty rate.

9 THE COURT: But he doesn't explain how.

10 MR. ROBERTSON: And after consideration -- he
11 explains in the context of each -- this is a summation
12 paragraph, Your Honor. The way you look at these factors is
13 say, this factor tends to drive the royalty rate higher --

14 THE COURT: Where does it say that? Let's take
15 evaluation of factor three. Take that one. Where does it say
16 that in the report, that it drives the 2.5 to the 5.6 higher
17 and explain why?

18 It doesn't, I don't think, or your briefs would have
19 explained it better. It's the absence of the explanation in
20 the briefs that leads me to believe there's no substance here,
21 there's a lot of smoke. Where is it?

22 MR. ROBERTSON: Factor three is discussed at 18.

23 THE COURT: All right. Let me understand how he
24 shows that it goes -- it's one thing to say, factor three
25 drives -- here is factor three, and I see that that's what he

1 does on page 18, but maybe it's just I don't understand the
2 language of the economics here. Tell me how you can say that
3 he has, at this point, explained how factor three leads to or
4 contributes to a royalty rate greater than 2.5 to 2.7.

5 MR. ROBERTSON: I may have misspoke, Your Honor, in
6 this sense: Factors three, four, seven, and 14 he finds to be
7 neutral to having an impact on the royalty rate.

8 THE COURT: All right.

9 MR. ROBERTSON: I think I said earlier factors five,
10 six --

11 THE COURT: Let's take factors five and six then.
12 Where does he explain that?

13 MR. ROBERTSON: Factor five has to do with the
14 commercial --

15 THE COURT: It's on page what?

16 MR. ROBERTSON: 19, sir. Commercial relationship
17 between the licensor and licensee such as whether they are
18 competitors in the same territory and whether they are in the
19 same line of business.

20 When he looks at that factor, he understands that
21 Lawson and ePlus compete for customers and sales of electronic
22 sourcing and procuring systems and services.

23 THE COURT: I've read what he did. This is actually
24 what's recited. I think some of this is recited, or the
25 essence of it is recited in some of the papers.

1 MR. ROBERTSON: So he says, this suggests a greater
2 level of competition between ePlus and Lawson as compared to
3 ePlus and Ariba --

4 THE COURT REPORTER: Mr. Robertson, I have no idea
5 what you're saying.

6 MR. ROBERTSON: This suggests a greater level of
7 competition between ePlus and Lawson as compared to ePlus and
8 Ariba or SAP.

9 THE COURT: Okay. I understand. And I read six, and
10 he says that it drives it higher in six and eight through 13.
11 Let me look at those.

12 All right. In all of that, what he says is, it
13 indicates a higher royalty rate. He doesn't explain at all how
14 he doubles it. What he's done is take a range of two to 3.7,
15 say it's higher because of those factors. Those are six, five
16 factors. It doubles the rate to five, six, basically, not
17 quite completely doubled on the high end, and not one time does
18 he explain how any one of those factors achieves that doubling
19 or how that combination of factors achieves that doubling, and
20 that is what I think he has to do in order to do it so that it
21 is reliable and that there is a fit, in the words of *Daubert*.
22 Why isn't that the right result in this case, i.e., he just
23 hasn't done it right?

24 MR. ROBERTSON: Judge, I think that's really holding
25 somebody to a higher standard. Let me just explain. The

1 Federal Circuit has repeatedly said, this *Georgia-Pacific*
2 analysis is the appropriate analysis under *Daubert* and in the
3 *Micro Chemical v. Lextron* case, a similar case where someone
4 tried the *Daubert* damages expert by saying that, you know, it
5 was somehow unreliable.

6 The Federal Circuit reversed saying, no, he used the
7 proper methodology. The appropriate approach was to
8 cross-examine. Now, this isn't an exact science. As the
9 Federal Circuit has said, as recently as this *Lucent* case that
10 we cite in the briefs, creating a license agreement for
11 patented technology is, at best, an inexact science. The
12 *Fromson* case says, it often involves talents more of a conjurer
13 than those of a judge, but he did the best way he could --

14 THE COURT: You know what? Bear Bryant said years
15 ago, that and a nickel will get you a Coke, and let me explain
16 to you. If you're arguing to me that I'm to accept conjuring
17 as an appropriate method, I don't believe I'm buying that.

18 MR. ROBERTSON: What he did was take eight of those
19 factors, I believe the count is eight or nine, eight through
20 13, that's six, seven, eight factors of the 15, leaving aside
21 the factor in number one, the Ariba and the SAP, and he said,
22 look, those have a tendency to raise the royalty rate.

23 Is that going to be exact and tell you exactly how
24 this factor impacts and drives it up a tenth of a point or
25 two tenths of a point? No, no one can really do that, and I've

1 never seen that done, Your Honor, in the con --

2 THE COURT: I have seen it done, and it's done all
3 the time. I'm going to recess now for lunch, and you can go
4 find out the speculation. I think that you've got problems
5 with this.

6 Do you have any other answers that in some part of
7 this report that he does what he needs to do? He at least has
8 to say, if I take all of a combination of these factors, it
9 drives it -- he's doubled the rate now -- that it doubles the
10 rate, and here's basically why it doubles the rate.

11 What he's done is make a conclusion that would give
12 him the basis for making an analysis later that he never makes,
13 and when you try to double the ante on somebody, you've got to
14 have more than conjuring. That's how I feel about it, and the
15 spec -- I still don't understand how he did not speculate as to
16 the SAP and Ariba sales based on your papers, but I didn't have
17 the 3-A of his report, or if he did, I didn't understand that
18 that's what it was. So you can show me after lunch. We'll
19 take an hour recess.

20

21 (Luncheon recess.)

22

23 THE COURT: All right. Mr. Robertson, did you find
24 the part where he explains the basis for -- what the SAP and
25 Ariba sales were in the royalty calculation?

1 MR. ROBERTSON: Yes, sir, I did.

2 THE COURT: Where is that?

3 MR. ROBERTSON: May I hand up to the Court the
4 appendices which are 3-A through 3-D with respect to Ariba and
5 4-A and 4-D with respect to SAP. If I might try to explain --

6 THE COURT: Excuse me, 3-A is --

7 MR. ROBERTSON: 3-A through 3-D, Your Honor, relate
8 to Ariba. 4-A through 4-D relate to SAP, and they track each
9 other in the information they are attempting to disclose.

10 THE COURT: What period does it cover here now? It's
11 hard for me to read. 11/1/2003 to 12/1/2003.

12 MR. ROBERTSON: What it does, Your Honor, is it
13 tracks the actual accused revenue for Ariba in this first
14 slide, 3-A, up until the time of the settlement, and then in
15 order to determine what the appropriate royalty rate would be,
16 Dr. Mangum projects the 2006 sales revenue which was obtained
17 through the life of the patents at a static number, because
18 that information is not available at the time that the parties
19 sit down and negotiate the license. So he took a conservative
20 figure going forward from the date the license was executed.

21 THE COURT: Where does it say what he picked?

22 MR. ROBERTSON: Well, you see under 2006, the
23 revenues were \$191,446 and 762, and he continues to project
24 that static -- well, no growth --

25 THE COURT: That's the same figure beginning in 2004.

1 MR. ROBERTSON: I believe we had partial information,
2 Your Honor, for 2005 and 2006. Actually this came from the
3 data that was produced during the SAP litigation and was part
4 of SAP's expert report on Ariba's data that they had obtained
5 through discovery from the Ariba case.

6 THE COURT: It doesn't say that.

7 MR. ROBERTSON: Well, this source down here, Your
8 Honor, the ePlus document Bates number that was produced in
9 this litigation is that report. In fact, I think we printed it
10 out.

11 THE COURT: The thing that's listed as a source at
12 the bottom of this identifies a document that is what?

13 MR. ROBERTSON: It is an expert report from the SAP
14 case, Your Honor, that had the figures that were actually
15 discovered during that litigation and also obtained from the
16 Ariba litigation. And what Dr. Mangum needs to do, then, is
17 project --

18 THE COURT: Why would the SAP litigation figures be
19 relevant to determining what the actual sales of Ariba were?

20 MR. ROBERTSON: That was the source, Your Honor,
21 because SAP had obtained the Ariba revenue information during
22 that litigation, and it was included in SAP's expert report.

23 THE COURT: Wait a minute. You're saying there was
24 litigation between SAP and Ariba?

25 MR. ROBERTSON: No, sir. We had litigation with SAP.

1 During the course of that litigation, we were going through the
2 same process that we're doing right here with Lawson as to what
3 a reasonable royalty would be. That made the Ariba license
4 relevant to the SAP litigation. Based on that, SAP's damages
5 expert examined those revenues that were discovered through
6 discovery in the Ariba case and in the SAP case.

7 In other words, we had information that we obtained
8 during the Ariba case. SAP had that same information. They
9 processed that information and included it in their expert
10 report. I don't know why I'm not making myself clear, Your
11 Honor. Let me try again.

12 THE COURT: I think I understand, but what I don't
13 understand is how does that provide the basis for figuring out
14 what the revenue is going to be in the future?

15 MR. ROBERTSON: Well, it doesn't, Your Honor, but
16 nobody typically has information for projected sales in the
17 future, and the Federal Circuit has said, that's perfectly
18 acceptable. When you're sitting down in this actual
19 negotiation with Ariba, I don't have the information of what
20 their projected sales in the future are going to be.

21 All Dr. Mangum can do is say, I'm going to take the
22 conservative approach and assume no growth for the life of the
23 patents on the last reported year, and if I could just --

24 THE COURT: Why is that conservative in an economy
25 that's tanking?

1 MR. ROBERTSON: Well, the economy wasn't tanking back
2 in 2006, Your Honor.

3 THE COURT: It is now. It has been since 2007.

4 MR. ROBERTSON: No one could have predicted that,
5 Your Honor, back in 2006 --

6 THE COURT: But we're talking about now.

7 MR. ROBERTSON: We're actually not, Your Honor. We
8 are talking about what projected revenues would be at the time
9 they entered the settlement agreement, and as the Federal
10 Circuit said most recently in the *Lucent* case, which is 580
11 F.3d 1301, decided in September of 2009, "consideration of
12 evidence of usage after infringement started can, under
13 appropriate circumstances, be helpful to the jury...in
14 assessing whether a royalty is reasonable. Usage of similar
15 data may provide information that the parties frequently have
16 estimated during the negotiations."

17 It goes on to say, "even though parties to a license
18 negotiation would usually not have precise data about future
19 usage, they often have rough estimates as to the expected
20 frequency of use. This quantitative information, assuming it
21 meets admissibility requirements, ought to be given its proper
22 weight in each case."

23 THE COURT: I understand that.

24 MR. ROBERTSON: What I'm suggesting right here, Your
25 Honor --

1 THE COURT: We're talking about a negotiation that
2 occurs in 2002; right?

3 MR. ROBERTSON: No, sir. I'm talking about -- this
4 was an actual negotiation that occurred and was consummated in
5 2006, so that money was realized, Your Honor, with Ariba at
6 \$37 million, and what Dr. Mangum is trying to say is, okay, let
7 me determine what that would be as a royalty rate for my range
8 as a running royalty if I assume that Ariba's sales were static
9 for the life of the patent.

10 What he next does in the next slide, if I could just
11 follow, because this is how he gets his range, he assumes that
12 immediately after the license agreement is signed, the license
13 agreement effectively -- the patents effectively become
14 obsolete. So he examines what the royalty rate would be if the
15 day after the license agreement was consummated the patents
16 were obsolete, and he comes up with an effective rate of
17 8.3 percent in that instance.

18 He then does in 3-C a midrange calculation, if you'll
19 turn, and I'll just go --

20 THE COURT: You mean 3-B is a low?

21 MR. ROBERTSON: 3-C, as in cow.

22 THE COURT: 3-B is a low figure. I don't understand
23 what?

24 MR. ROBERTSON: 3-B is a high figure, because the
25 \$37 million accounts for the revenue right up until the patent

1 was signed, the patent license was signed, and then the patent
2 becomes obsolete. That is the shortest commercial life for the
3 license agreement.

4 THE COURT: What's the obsolescence of the patent?

5 MR. ROBERTSON: What he's trying to do is come up
6 with a reasonable range for what the royalty rate would be
7 making certain assumptions. One assumption is that the patent
8 becomes obsolete. The licensee no longer needs it right
9 after --

10 THE COURT: Why did he do that?

11 MR. ROBERTSON: So he could come up with a range of
12 the royalty rates, Your Honor, so --

13 THE COURT: Why did he say, I'm going to assume --
14 this guy signs a license and then doesn't need to operate -- I
15 don't understand that point. Like most of the things that Mr.
16 Mangum does, I don't understand, but anyway, what is the reason
17 for doing it the way he did it?

18 MR. ROBERTSON: Because he's trying to find a
19 reasonable midpoint, Your Honor.

20 THE COURT: Well, it sounds to me like he's flailing
21 around in the figures. Why did he pick -- why did he make the
22 decision to factor out the patent is what I'm trying to get at.

23 MR. ROBERTSON: He made the decision to consider
24 either ends of the spectrum, Your Honor.

25 THE COURT: Why does it make sense to take it out?

1 That's what I'm asking. I don't care what result he achieved,
2 high, low, or indifferent. Why do you make the decision to
3 take it out? There's got to be an intellectual reason. I'm
4 doing it for what reason?

5 MR. ROBERTSON: I'm not sure I understand what you
6 mean by take it out, Your Honor.

7 THE COURT: He's assuming the patent is obsolete.

8 MR. ROBERTSON: He's trying to come up with what
9 would be a reasonable assumption from either end of the
10 spectrum; that is where the patent immediately becomes obsolete
11 to where the patent is valuable and used for the entire life
12 expectancy of the patent, and he comes up with a number for
13 that low spectrum and a number for that high spectrum, and then
14 he says, here, I'm going to take something reasonable in
15 between. It's a midpoint.

16 THE COURT: Which is the low spectrum?

17 MR. ROBERTSON: Low spectrum would mean the payment
18 extends for the life of the patent.

19 THE COURT: Does that mean when the patent is
20 obsolete?

21 MR. ROBERTSON: That means when the patent expires.
22 What I mean by the patent being obsolete, Your Honor, is the
23 technology is no longer valuable to the licensee, and so it
24 doesn't need to use it anymore. So it terminates virtually
25 right after --

1 THE COURT: I don't see any of that in here. Where
2 do you figure that? Where does it say that in 3-B? Where does
3 it say that?

4 MR. ROBERTSON: It's because the values of accused
5 revenue terminates in February of --

6 THE COURT: Where does it say that -- just answer the
7 question. Where does it say that?

8 MR. ROBERTSON: It says it in his report, Your Honor.

9 THE COURT: Okay, that's fine. I don't need to look
10 for it in the exhibit.

11 MR. ROBERTSON: He references this exhibit in his
12 report, Your Honor.

13 THE COURT: Yes, he does.

14 MR. ROBERTSON: So that's where he's --

15 THE COURT: Where does he say it in the report?
16 Referencing and saying what you just said are different things.

17 MR. ROBERTSON: I believe it starts at page 11 of his
18 report, first full paragraph, beginning, these lump sum fixed
19 payment amounts provide economic evidence reflecting the value
20 attached to the relevant patents by the parties to the license
21 agreements -- excuse me, to the agreements.

22 Although the patent amounts in the Ariba and SAP
23 agreements reflect one-time payments regarding specific amounts
24 of accused sales, the payment amounts can be reasonably and
25 appropriately evaluated to provide information on payment

1 amounts that would reflect the situation between the parties in
2 the present suit.

3 It goes on to say, the lump sum payments can be
4 converted into effective running royalty rates. He explained
5 that 3-A reflects the amount of the accused Ariba revenue at
6 issue in the agreement with ePlus. The Ariba license covered
7 past and future sales. In addition, by paying up front, Ariba
8 was bearing, agreeing to bear the business risk related to
9 making the accused sales and the risk related to the effective
10 economic life of the patent in suit.

11 So he goes on to explain on the next page, first full
12 paragraph, as shown in Exhibits 3-A through D, the effective
13 running royalty rates from the Ariba settlement range from 3.0
14 percent to 8.3 percent. He says, setting aside this extreme
15 reflecting never obsolete, which means they run until the
16 patents terminated, to immediately obsolete, leaves a range of
17 3.3 to 4.2 percent with a midpoint of 3.8 percent.

18 So what he's trying to do, Your Honor, is say, these
19 are the extremes, I want to pick something that's within the
20 extremes, because it's rare that the patents are either going
21 to become immediately obsolete or going to be never obsolete.

22 THE COURT: All right.

23 MR. ROBERTSON: He goes on to do the exact same
24 calculation with the SAP license agreement. I was reminded by
25 my colleagues that I had mentioned earlier, Your Honor, that

1 one of the factors he considered with the Ariba license and the
2 SAP license was that there was additional consideration, that
3 is cross licenses, which necessarily, he says, would impact on
4 the actual monies paid because there was additional
5 consideration. So he takes that into effect when he determines
6 what an appropriate range of the royalty rates would be.

7 THE COURT: How does he do that?

8 MR. ROBERTSON: He determines that they're depressed
9 somewhat. It's acceptable --

10 THE COURT: What?

11 MR. ROBERTSON: The numbers would be depressed, that
12 is lower, because there was additional consideration. Just,
13 you know, an economic assumption that's tried and true when you
14 have additional consideration. Can he say with exactitude what
15 that present --

16 THE COURT: How did he get to whatever figure he
17 chose?

18 MR. ROBERTSON: Well, he took the ranges, Your Honor.

19 THE COURT: To reflect the diminished amount
20 accounted for by the fact that there was additional
21 consideration?

22 Here's the problem, Mr. Robertson: This guy is as
23 smart as a cut cow, and you all have been through this a lot.
24 That's not what we're dealing with. He's got to explain in the
25 report in this case so they can deal with it and the jury can

1 deal with it how he did what he did. He could have just as
2 well have ascribed a ridiculous figure to the value created by
3 the additional consideration, and where in here does he explain
4 what it is that he did to ascribe a value to the additional
5 consideration so he could factor that out and account for the
6 depression in the royalty rate? Where does he do that? Other
7 than say, I did it, where does he actually do it and tell us
8 what he's doing?

9 MR. ROBERTSON: Your Honor --

10 THE COURT: Where does he do it? If he doesn't do
11 it, say he doesn't do it. That's fine.

12 MR. ROBERTSON: I need to find it, Your Honor.

13 THE COURT: Take a moment and look at it. In the
14 report, what page?

15 MR. ROBERTSON: Page 13, Your Honor.

16 THE COURT: 13, all right, let me look at that.

17 MR. ROBERTSON: At the bottom, he says, in the Ariba
18 agreement, Ariba contributed all of its patents which are --

19 THE COURT: Wait a minute. Let me find it. Page 13,
20 what paragraph?

21 MR. ROBERTSON: Third full paragraph, second
22 sentence.

23 THE COURT: Okay, in the Ariba agreement, all right.

24 MR. ROBERTSON: Ariba contributed all its patents
25 which are more numerous than the patents in suit.

1 THE COURT: Right.

2 MR. ROBERTSON: He drops a footnote concerning the
3 enforcement of one of the Ariba patents that he was aware of --

4 THE COURT REPORTER: Mr. Robertson, I can't hear you.

5 MR. ROBERTSON: He drops a footnote, footnote 46,
6 which he indicates that he was aware that one of the Ariba
7 patents that had been licensed actually involved litigation
8 resulting in damages figures.

9 THE COURT: I still don't understand how he values
10 this. He just -- these are words that don't actually reflect
11 that he's doing anything, what his process was and how he got
12 there. Therefore, they are just his conclusions.

13 Is there something else in the rest of the paragraph
14 that explains how he got to the valuation he gave to those
15 patents that were not accused?

16 MR. ROBERTSON: Your Honor, in all fairness --

17 THE COURT: And were included in the license. Just
18 answer the question.

19 MR. ROBERTSON: He applies his understandings as an
20 economist to --

21 THE COURT: Here's what I'm going to do. If you
22 don't answer the question, I'm going to supply the answer that
23 I think is the answer based on reading the document, and if you
24 want to explain, you're perfectly willing to explain it. I
25 need to get the basics down first. Does he or does he not,

1 anywhere in this report, explain what he did to arrive at the
2 value that he factored out because of the additional patents?
3 If so, where in this report is it so I can read it?

4 MR. ROBERTSON: I think, Your Honor, he doesn't do it
5 with the mathematical exactitude that you are looking for.

6 THE COURT: I'm not looking for exactitude. I'm
7 looking for what he did no matter how exact it is.

8 MR. ROBERTSON: He says in the next sentence there,
9 all else equal, the contribution of the Ariba patents rendered
10 the settlement amount, \$37 million, a net amount lower than it
11 would have been otherwise. That's as close as he can get based
12 on --

13 THE COURT: That's just a conclusory assertion. You
14 know, an expert can come in here and say anything, and he has
15 to explain how he got where he got or his ideas aren't really
16 very valuable to the jury. They become -- they become at that
17 point -- you come to the point with this kind of stuff in the
18 report where his influence on the jury is not created by the
19 intellectual power he has brought to the report but by the fact
20 that he is an expert, and that doesn't help the jury understand
21 the evidence or determine the fact in issue, and it also calls
22 into question the reliability of the conclusions in my
23 judgment.

24 MR. ROBERTSON: Well, Your Honor, let me just
25 respectfully disagree and make this point.

1 THE COURT: Sure.

2 MR. ROBERTSON: The *Georgia-Pacific* are factors.
3 They are not a precise calculation that says to an economist or
4 says to a damages expert, factor number 11 should drive up the
5 royalty rate by .3 percent, or factor number nine should drive
6 it down by .5 percent. I have never seen that in a Federal
7 Circuit decision. I have only seen the Federal Circuit say --

8 THE COURT: That's not addressed to this issue.
9 We're going to address the question of the contribution made, I
10 thought.

11 MR. ROBERTSON: He has not done it with the
12 mathematical exactitude that Your Honor apparently is looking
13 for.

14 THE COURT: You don't know what I'm looking for.

15 MR. ROBERTSON: This is the only thing, sir, I can
16 point to.

17 THE COURT: Okay, that's fine.

18 MR. ROBERTSON: With respect to the factors, the
19 Federal Circuit says, you have to weigh the factors. What
20 weight you give them is in the opinion of an economist based on
21 the totality of the circumstances. When he's looking at 15
22 factors in this report, for example, he found eight of the
23 factors that weighed in favor of increasing the royalty rate,
24 and he found, I think, the other six that were neutral with
25 respect to that.

1 Now, if he came into this Court and said, factor
2 number seven warrants a 3.3 percent increase, that would be
3 disingenuous, Your Honor. Nobody has ever done that with the
4 amount of precision under the methodology of the
5 *Georgia-Pacific* factors that has been accepted by the Federal
6 Circuit.

7 I've been doing this for 20 years, sir. I've worked
8 with a lot of economists and damage experts. It just doesn't
9 happen.

10 THE COURT: Well, if that's true, perhaps, like other
11 aspects of patent law, patent law and lawyers and courts need
12 to come into the world that the rest the people function in in
13 applying the expert disciplines in assessing expert reports.

14 However, I don't believe that what you're saying is
15 right. I think it can be done. I've seen it done, and it is
16 important that at least some effort be made to explain what it
17 is, why he reaches whatever opinion he reaches.

18 Now what you're basically talking about is what we
19 were talking about before lunch, and that is what the effect of
20 his failure to explain how factors five, six, and eight through
21 13 indicate a higher royalty rate. We agreed before lunch that
22 he didn't explain how they did, and you were saying that's not
23 required.

24 MR. ROBERTSON: He explained why he thought they
25 weren't a higher royalty rate. He did not do it, apparently,

1 Your Honor, in a way that would provide exact quantification as
2 to how incrementally that would raise it.

3 THE COURT: Did he provide any quantification?

4 MR. ROBERTSON: He provided a cumulative
5 assessment --

6 THE COURT: Show me where he did any quantification
7 of any single factor or of those factors added together other
8 than his conclusory conclusion that five and six and eight
9 through 13 will result in a higher rate, ergo I'm going to
10 double it from two to 3.7, that level, to five to six? Did he
11 do that?

12 MR. ROBERTSON: Let me suggest he didn't necessarily
13 double it, Your Honor, because one of the assumptions we saw,
14 he had an eight percent royalty rate at one point, and he
15 actually threw that one out as being nonrepresentative.

16 THE COURT: It was an outlier.

17 MR. ROBERTSON: In his opinion, yes, that's right.

18 THE COURT: And the low one was an outlier.

19 MR. ROBERTSON: That's correct.

20 THE COURT: That's fairly standardly done in making
21 analyses of this kind.

22 MR. ROBERTSON: There are a lot of assumptions that
23 go into this, and the assumptions can always be challenged, and
24 exactly that's what the --

25 THE COURT: Your argument is that all this has to do

1 with -- doesn't affect the validity of his report, the
2 reliability of it under *Daubert*. It has to do with the issue
3 could be dealt with in cross-examination.

4 MR. ROBERTSON: I'm not only saying it. The *Micro*
5 *Chemical Lextron* case says exactly that, Your Honor, and it
6 doesn't say in that case that the experts need to offer a
7 quantitative analysis as to these factors which simply need to
8 be weighed.

9 THE COURT: I don't think that issue was presented in
10 that case, was it, that they had to do a quantitative -- I
11 don't think it's presented here.

12 MR. ROBERTSON: I think it was exactly what was
13 presented because his analysis was thrown out, and they said,
14 look, he adopted the proper methodology. The fact is, under
15 702 and under the *Daubert* case, the *Georgia-Pacific* factors are
16 something that can be weighed in determining what the
17 appropriate royalty rate is.

18 Can they be attacked on cross-examination? Yes, and
19 that's the proper vehicle for dealing with an expert, not
20 throwing his testimony out. If they want to question him on
21 his failure --

22 THE COURT: Let me disapprise you and anybody else
23 who is interested. *Daubert* says that you keep the testimony
24 out if it's not reliable, i.e., the judge has a gatekeeping
25 responsibility as to who goes on and explains it, so there is

1 actually animated by *Daubert* and its progeny an obligation to
2 exclude unreliable evidence from a jury, and to the extent that
3 someone in another court, including the Federal Circuit, has
4 held that that isn't so, I'm bound by the Supreme Court, not by
5 any other court.

6 Now, does that mean that the automatic approach to
7 resolving problems with experts' reports is to keep them out?
8 No, it certainly isn't, but don't believe for a moment that the
9 issue here is not properly raised as to whether this report can
10 come in under the *Daubert* methodology -- under the *Daubert*
11 decision and its progeny, and the issue they are raising is not
12 so much methodology but reliability based on conclusory
13 thinking and assertions.

14 MR. ROBERTSON: I don't think he could come to any
15 other precise conclusions other than the factor tends to raise
16 the rate, it's neutral, or it lowers the rate. I just don't
17 think the methodology, when you look at factors themselves,
18 even applied to the circumstances of a patent case or any case,
19 permits an expert to reasonably say, oh, I think this raises it
20 three percent, three-tenths of a percent of a point.

21 THE COURT: Suppose that he's doubled it now, he's
22 gone from a million dollars to \$2 million. That's a pretty --
23 in fact, what he's done is gone from one set of millions to
24 double that in the number of millions is what he's done in his
25 report. That's a lot of money, and people are entitled to know

1 how it is that you come to the conclusion that you go from one
2 million to two million or from ten to 20, aren't they?

3 MR. ROBERTSON: And I think within the methodology
4 that's provided, he has attempted to do that, Your Honor. He
5 has tried to show under the factors that they provide -- this
6 isn't something he made up. This is something that he was told
7 is the appropriate methodology for doing it. Now --

8 THE COURT: Who told him that?

9 MR. ROBERTSON: The Federal Circuit said, this is the
10 accepted, and it's accepted across the land as the approach for
11 determining a reasonable royalty, and the statute itself says
12 that a patent owner, where there's a finding of infringement,
13 can receive no less than a reasonable royalty, and that's
14 always the floor.

15 So, he's looked at the factors. He's looked at how
16 he can weigh them. Can he weigh them with the preciseness that
17 the Court apparently is requiring --

18 THE COURT: If you say that one more time, I'm going
19 to strike it as -- I'm telling you, he needs to explain in some
20 way how he does it. He hasn't explained any way, and the
21 failure to explain it is what's the issue.

22 MR. ROBERTSON: Might I suggest, Your Honor, then
23 perhaps we could have a voir dire. Perhaps your issue of
24 bifurcation might be worth examining. I could discuss that
25 with my client. He's been cross-examined on this by Lawson's

1 counsel. This is where we find ourselves, Your Honor.

2 THE COURT: All right, I understand. Anything else
3 that you have on this motion, Mr. Robertson?

4 MR. ROBERTSON: Let me see my notes, Your Honor, see
5 if there were any other issues that were raised. I think the
6 issue of the sales revenues don't need to be rehashed that are
7 accused.

8 THE COURT: His argument included an argument that
9 your expert did not even address the issue of the
10 capitalization and profitability of Lawson which is one of the
11 *Georgia-Pacific* factors. What do you say to that?

12 MR. ROBERTSON: Let me go back and look. It may have
13 been a factor he didn't consider relevant. I think there were
14 a few factors -- when we met with him to determine his report,
15 he said, I find sometimes some of these factors to be not
16 relevant to the inquiry.

17 THE COURT: But the way I see it -- I've got to get a
18 list of the factors. I never can remember the numbers.

19 MR. ROBERTSON: Your Honor, I guess he considered it
20 cumulatively starting at page 25 where he groups factors nine,
21 10, and 11 together.

22 THE COURT: Hold on just a minute. I need to --
23 which one of your briefs has the *Georgia-Pacific* factors listed
24 by number?

25 MR. ROBERTSON: I think we have a slide on it, Your

1 Honor. Slide 15 --

2 THE COURT: Slide what?

3 MR. ROBERTSON: 15 in tab three, I believe.

4 THE COURT: Thank you very much. I never can
5 remember the numbers. Okay. Let's see. Which one are you
6 raising it under? I didn't write the number down you were
7 arguing, Mr. McDonald. Eight, factor eight. "The established
8 profitability of the product made under the patent; its
9 commercial success; and its current popularity."

10 He says that he didn't consider the established --
11 Mr. McDonald says that your man didn't consider the established
12 profitability of the product. Where in the report does he
13 consider that? You were about to tell me, and then I
14 interrupted you.

15 MR. ROBERTSON: Factor eight begins on page 22, Your
16 Honor.

17 THE COURT: Page 22 of Mr. Mangum's report.

18 MR. ROBERTSON: Second full paragraph, I think, and
19 going over to page 23. I don't know if you want me to read it,
20 Your Honor.

21 THE COURT: No. I just want Mr. McDonald to address
22 it once you've identified -- it looks to me like he's got four
23 pages addressing it, three and a half pages addressing it, but
24 I may be wrong. All right, so that's where it is. All right.
25 I see. Anything else?

1 MR. ROBERTSON: No. Thank you, Your Honor.

2 THE COURT: All right, Mr. McDonald. Kind of looks
3 likes he's addressing profitability on page 22 of the report,
4 isn't it? You may not like it, but it's what he's talking
5 about. What's defective about it.

6 MR. McDONALD: Let me explain what I was talking
7 about there, Your Honor. It does mention -- to some extent he
8 mentions at the time of the hypothetical negotiation, Lawson
9 would have an operating profitability of five percent, which is
10 actually the low range of his reasonable royalty, so I guess
11 what he's saying on that particular number is Lawson would
12 have, under a reasonable analysis, would have given all its
13 profits over to ePlus.

14 He says that there's some indications that perhaps
15 the profitability is greater, but really, here's my main point
16 on this. When he goes through these other factors, it's
17 always, okay, let's look at SAP and Ariba and now compare them
18 to Lawson. Competition-wise, well, Ariba and SAP are in the
19 business, but I have decided in my opinion that Lawson is a
20 closer competitor.

21 So he keeps using Ariba and SAP as a benchmark or
22 loadstar, but you don't see that anywhere in here, and that's
23 because SAP makes a lot more money. They have a bigger profit
24 margin. He just glosses over that. Well, his methodology is,
25 I'm going to start from this range that I've come up with on

1 the effective royalty of SAP and Ariba and now compare those
2 companies to Lawson on a comparative relative basis. Where
3 does he do that on the profitability? He doesn't say anything
4 about the SAP profitability. He doesn't say anything about the
5 Ariba profitability in this profitability analysis comparing
6 Lawson to SAP and Ariba. That's a fundamental flaw.

7 THE COURT: All right. That concludes one through
8 three.

9 MR. McDONALD: If I could mention the speculative
10 nature of the sales, those charts in the appendix that
11 Mr. Robertson drew your attention to after lunch, I just want
12 to make clear here the amount of speculation in this tiny print
13 here.

14 THE COURT: Hold on a minute. I need to pull that
15 back up. This is referred to on what page of his report? Ten
16 or 11?

17 MR. McDONALD: 3-A. It's after page --

18 THE COURT: 3-A is referred to on page 12.
19 Exhibit 3-A reflects the amount of accused Ariba revenue at
20 issue in the license agreement with ePlus.

21 MR. McDONALD: Yes. You're talking about the body of
22 the report. I was actually going to the exhibit itself.

23 THE COURT: All right.

24 MR. McDONALD: Which is near the back, and at least
25 my copy does not have a page number, but it's -- I think you

1 referred to that earlier. It comes after a page numbered 15
2 near the end. It's the first of these charts.

3 THE COURT: I'm lost because you said there isn't any
4 page numbers.

5 MR. McDONALD: My copy of Exhibit 3-A doesn't have a
6 page number on it.

7 THE COURT: Mine doesn't either, but there's Exhibit
8 3-A, and it looks to me like it's one page. Exhibit 3-B is
9 another, 3-C is another. 3-D is another, and then 4-A is SAP
10 running rate. 4-B is -- 4-C is -- 4-D are all SAP royalty
11 calculations.

12 MR. McDONALD: We're in the same place then.

13 THE COURT: What page do you want me to look at?

14 MR. McDONALD: Let's start with 3-A. Now, there you
15 have the accused revenue, and the footnote A assumed that after
16 2003, the annual accused revenue will equal 2003 accused
17 revenue. So they take one year from 2003 to today, and they
18 pick that year, and that's the year they assume is going to be,
19 or was, Ariba's sales for every one of those eight years.

20 2005 is when they actually settled the case. You can
21 see they've got their cutoff here because February 12th, '05 --
22 if you look at the columns, you see they divided 2005 into two
23 parts, because it was kind of a past or compound factor versus
24 the discount factor for the future activities.

25 So why would -- why is it reasonable for their expert

1 in February of '05 to think that Ariba was thinking in terms of
2 their 2003 revenue? He's got no showing of why wouldn't you
3 look at 2004 revenues and pick that number. That number can
4 make a huge difference because that's the one and only number
5 that's you're multiplier here for eight or nine years, and this
6 particular chart goes all the way out to 2016. So that's a
7 huge swing factor. It's a number times 14.

8 THE COURT: The revenue for 2003 is 29 million -- I
9 mean --

10 MR. McDONALD: You are right, but that is just a
11 partial year.

12 THE COURT: 11/1/2003 to 12/1/2003 is 21,265,000.

13 MR. McDONALD: It's 29,265,000. I have my glasses
14 on.

15 THE COURT: 29 million, yes. And the other in 2004
16 is 100 -- is that 191 million?

17 MR. McDONALD: That's right.

18 THE COURT: So this would be 29 times five -- times
19 12, roughly 30 times 12 would be 360 million. I do not
20 understand where this guy got these assumptions. Is there
21 anything that explains it?

22 MR. McDONALD: No. That was one of my points, is he
23 has this November 1 to December 31, '03 as his first time
24 period. He doesn't explain why he stops the past revenue at
25 November 1 of '03. There's no place in the report that

1 explains that, but he does it. That's a two-month period. It
2 doesn't explain where that 29 million figure for that two-month
3 period comes from. The footnotes don't explain that.

4 It says it's an apportionment of fiscal 2004, first
5 quarter. So here he's using '04 numbers to calculate '03, and
6 then he uses '03 numbers to calculate '04 on. I'm sorry for
7 sounding confusing, Your Honor, but I'm just the messenger
8 here. That's the crazy way this guy was doing these numbers.
9 It makes no sense to me either, and he doesn't explain why he
10 would do that backwards.

11 So you've got that, no explanation here, why didn't
12 you go and try to get the actual '04 sales or find out actual
13 '05, '06, up to 2010. I know Mr. Robertson would say in '05
14 Ariba wouldn't have been able to know what they were going to
15 do in '06 and '07, but that's probably a little better
16 indication of what they would have been thinking, their actual
17 revenues than Mr. Mangum just assuming they're going to flat
18 line.

19 THE COURT: The question is, you deposed him. Did he
20 indicate in his deposition where in the report is the basis for
21 that assumption?

22 MR. McDONALD: I don't believe he did, Your Honor.
23 It's not in the report, I'm fairly confident. You are talking
24 about which assumption? The assumption of using the 2003
25 revenues?

1 THE COURT: He says he assumes that the 2003 revenue
2 figure would be the one that would be projected every year at a
3 flat rate. The case settled in 2005. I can't find any
4 explanation of why the man used -- why he assumed the 2000
5 revenue to be the basis, and I'm asking you if you know from --
6 I couldn't find it in the report, but that doesn't mean
7 anything. I could have mis-looked at it. You deposed him.
8 Did you ask him that?

9 MR. McDONALD: I didn't personally depose him. I'm
10 not aware of him providing a basis for why he used that year
11 instead of '04. This report doesn't explain that. I'm pretty
12 confident of that.

13 THE COURT: Okay.

14 MR. McDONALD: And also, I don't think he gave an
15 explanation of why he didn't go get the other numbers except
16 that they weren't handed to him. And all the other charts
17 basically use the same, similar types of assumptions. They
18 change the number of years that are involved, but they still
19 use the 2003 revenues without any explanation of why.

20 So for 2003, I agree, that's not a speculative
21 number, but for all the other years it is. And SAP, that's --

22 THE COURT: But you know that in doing the
23 negotiation in this case, it's going to be in 2002; right?

24 MR. McDONALD: Right. This is all giving the benefit
25 of the doubt that we even care what somebody was going to do in

1 2005.

2 THE COURT: All right. Anything else?

3 MR. McDONALD: SAP is basically a similar story
4 except that one is up to 2006. They do use the 2005 number for
5 after that, but, again, you have the whole year. Basically the
6 settlement was in December of '06. Why didn't you use at least
7 the first three quarters of '06, the actual data there? Why
8 didn't you figure out the actual data for '07, '08, '09, et
9 cetera, as the best indicator of all of what SAP was likely
10 thinking at the time?

11 So these are all speculative numbers after '05 on the
12 SAP charts as well. And I guess I'd mention one other thing
13 about that issue, and that is the *Wordtech* case -- that's one
14 of the cases we cited -- talks about not using a lump sum
15 licensing figure as a benchmark for the royalty even though the
16 party was trying to, in effect, come up with some theories as
17 to why the jury's verdict could be supported by this, and the
18 Court said, we're not going to do that because it's not in the
19 license where there's any evidence that this thought process
20 was actually going on that you have this expectation of a
21 certain amount of revenues and so on.

22 THE COURT: The lump sum settlement is \$37 million
23 with what, Ariba?

24 MR. McDONALD: That's Ariba.

25 THE COURT: All right. Is there an explanation in

1 the Ariba contract or anywhere else or the record that the lump
2 sum -- how the lump sum was arrived at?

3 MR. McDONALD: Mr. Mangum's report, if I recall
4 correctly -- I'll see if I can find the page while I'm talking
5 about it -- says that Ariba -- at page 14. Ariba indicated 37
6 million was the maximum it would pay. Otherwise, it would
7 declare bankruptcy.

8 Now, this would be something that I guess came out of
9 confidential settlement negotiations that we never would have
10 had access to.

11 THE COURT: Where is that?

12 MR. McDONALD: Page 14 at the top, about line four.
13 Lines four and five.

14 THE COURT: But --

15 MR. McDONALD: How we were supposed to know this, I
16 don't know.

17 THE COURT: But that's not the question I'm asking.
18 I'm asking you -- as I understand the Federal Circuit's cases,
19 lump sum can, in instances, be used -- lump sum payments can
20 be, in instances, used to project a reasonable royalty or to
21 convert it into a royalty if there's something in the license
22 agreement that allows one to conclude that the 37 million was
23 based upon the notion, some notion of a reasonable royalty such
24 as the reasonable royalty usually paid for this product are
25 three percent, and we'll present value discount it to X percent

1 by X percent, and, therefore, the total amount that we'll pay
2 you will be a lump sum paid-up license of Y.

3 MR. McDONALD: Exactly.

4 THE COURT: As I understand it, that's what the
5 Federal Circuit allows to be done when it requires -- or
6 requires to be done, something like that, if you're going to
7 use a lump sum.

8 MR. McDONALD: I would agree exactly with that, and
9 that statement by Mr. Mangum shows that the Ariba agreement
10 does not fit that criteria.

11 THE COURT: How about the lump sum in SAP? It was
12 what, 17 and a half?

13 MR. McDONALD: That's right.

14 THE COURT: Was there a license --

15 MR. McDONALD: There is no calculations, no
16 indication in the license agreement that this is the same as a
17 percentage or we're assuming we're going to have X million
18 dollars a year in sales or any indication that that number is
19 based on a revenue stream or present valuation of a --

20 THE COURT: Or of any other -- it doesn't have to be
21 present valuation. It can be, okay, we have decided that we
22 have a 50 percent chance of winning, and we're going to cut the
23 royalty rate from five to 2.5, we'll multiply that by the
24 sales, and that will be the lump sum we're going to pay you.
25 That's okay, too, isn't it?

1 MR. McDONALD: I don't know if you use that to
2 legitimize the royalty in another case --

3 THE COURT: No, I mean --

4 MR. McDONALD: -- but I think the --

5 THE COURT REPORTER: Mr. McDonald.

6 THE COURT: I think it was me. But anyway, is there
7 anything in the record about -- in Mr. Mangum's report about
8 how he got to the notion that these lump sum payments could be
9 appropriately converted in any way to a royalty stream?

10 MR. McDONALD: No. There's no indication that that
11 was even going through the minds of the people in the
12 negotiations. There's no evidence.

13 THE COURT: Usually the best evidence of that is the
14 agreement itself. That failing, then you can depose the people
15 and arrive at what their assumptions were in going forward, but
16 that wasn't done in this case?

17 MR. McDONALD: That's right. I'm not sure you could
18 take discovery on what people's settlement negotiations were
19 anyway, but it was not done, and we have no evidence on that.
20 That, to me, is a key point on why it's so speculative. That
21 is the fundamental premise for all of these numbers that Mangum
22 invents, is that people were even thinking in those terms.
23 There's no evidence they were, and, in fact, in Ariba, he
24 admits they weren't.

25 THE COURT: All right.

1 MR. McDONALD: Thank you.

2 THE COURT: Do you want to say something about any of
3 that, Mr. Robertson?

4 MR. ROBERTSON: I would, Your Honor. First let me
5 say both the Ariba and SAP licenses were both past and future
6 sales, and they say so right in the agreement. So there was a
7 release from past infringement, past damages, and there was a
8 license, fully paid-up license going forward for the life of
9 the patent until the last patent expired.

10 THE COURT: Does it explain in there what the past
11 and future sales were, and can you take the quantum of the
12 future sales and factor mathematically against the \$37 million
13 and come up with a basis for using that as a royalty rate?

14 MR. ROBERTSON: It doesn't break it down in the
15 agreement for this is the amount of dollars allocated to past
16 sales and this is the amount of dollars allocated to future
17 sales.

18 THE COURT: How about total sales? Does it total the
19 sales --

20 MR. ROBERTSON: It doesn't refer in the agreement,
21 and I've never typically seen it in license agreements that do
22 refer to total sales. Total sales are what the total accused
23 sales were.

24 THE COURT: Stop just a minute. Do you not agree
25 that a lump sum can be used in an appropriate situation as a

1 marker or measure of what a reasonable royalty will be if the
2 license agreement or some part of the record permits one to
3 reasonably assess, to translate the lump sum under some
4 commercially acceptable mode into what a reasonable royalty
5 would be? Isn't that permitted?

6 MR. ROBERTSON: I think that's what the *Lucent* case
7 says and vice versa. You can take a running royalty license
8 agreement and convert it to a lump sum.

9 THE COURT: Right. So my question is, what is there
10 in either the \$37 million figure or the \$17.5 million figure
11 that allows us to conclude that the -- in other words, how did
12 he conclude a reasonable running royalty from those two
13 figures? I didn't see it in here.

14 MR. ROBERTSON: Well, Your Honor, what he -- first of
15 all, go back to the 3-A through 3-D. What he does, he starts
16 from the beginning of the accused infringement, which is prior
17 to the settlement, and he carries it out through three various
18 scenarios as we talked about: A short-term license that would
19 terminate shortly afterwards, a midterm, and one that runs the
20 life of the patents. And he determines what the reasonable
21 royalty based on that would be, and then he tries to come up
22 with something that is a reasonable assumption understanding
23 that he can't absolutely predict the future as to what's going
24 to happen with respect to these patents.

25 THE COURT: Is the answer that one cannot determine

1 how he converted 37 from any of the license agreements or the
2 settlement agreements? You can't take those and the
3 information contained therein and determine how he converted 37
4 million and 17 million into a running royalty?

5 MR. ROBERTSON: No. In fact, we have the -- it's
6 slide -- not this one. The factors you would need, Your
7 Honor --

8 THE COURT: Where is the slide you're taking about?

9 MR. ROBERTSON: Actually I think -- I have how he did
10 the calculation in my outline.

11 THE COURT: It's not a slide.

12 MR. ROBERTSON: It's slide seven, Your Honor. Tab
13 one, Your Honor.

14 THE COURT: I don't have a tab one.

15 MR. ROBERTSON: Their motion *in limine*, tab one.

16 THE COURT: I misunderstood what you're saying. All
17 right. Tab one is the licenses to the patent in suit are
18 reliable evidence; is that what you are talking about?

19 MR. ROBERTSON: Yes, sir.

20 THE COURT: Where is it?

21 MR. ROBERTSON: Page seven.

22 THE COURT: Page seven.

23 MR. ROBERTSON: Some of the factors you need to know
24 is when the infringement started and when would have been the
25 termination of the license agreement, whether, as I said,

1 assuming Dr. Mangum's assumptions, early, midterm, or late.

2 He takes the lump sum amount paid, and he takes the
3 value of the accused revenue based on the license agreements,
4 he looks at the accused revenue for SAP and Ariba that are
5 disclosed in the damages expert reports. Those are the 3-A
6 through 3-D and 4-A through 4-D. If I can just address that
7 one issue Mr. McDonald raises --

8 THE COURT: Wait a minute. I'm trying to understand
9 something real simple, and these tabs don't show that, and that
10 is, what part of the settlement agreement or the record shows
11 factors that Mangum could or did use in converting the
12 \$37 million lump sum into a reasonable royalty, and the same
13 thing for the 17?

14 For example, \$37 million divided by the sales, total
15 sales figures equals what, or that we were using some other
16 formula to arrive at our \$37 million lump sum. Is there
17 anything like that in this record or in those agreements?

18 MR. ROBERTSON: The agreements were produced, and the
19 37 million covers both the past infringement and future
20 infringement.

21 THE COURT: Yes.

22 MR. ROBERTSON: Then what he does -- so the numerator
23 for determining what the royalty rate is going to be is going
24 to be 37 for Ariba and 17.5 for SAP. Then he's going to divide
25 that by the past yearly accused revenue going into the license

1 agreements.

2 THE COURT: Did he do that?

3 MR. ROBERTSON: In 3-A through 3-D and --

4 THE COURT: Either in 3-A -- 3-A and 4-A and
5 following or not at all.

6 MR. ROBERTSON: Yes.

7 THE COURT: Because it's not in the report. All
8 right, now, he refers to the 3-A -- look, the fact that
9 somebody refers to something doesn't mean it's in the report.
10 I'm trying to find out where it is.

11 Now, show me how he did -- take 3-A and show me how
12 he did that. Use the numbers he used -- I don't see how he did
13 it, but I'm sure -- and the report doesn't explain how he did
14 it, so just help me. Settlement amount is 37 million. The
15 effective rate is three percent. How did he get that?

16 MR. ROBERTSON: He takes, Your Honor, the accused
17 revenues that he has -- he had information for the full year
18 available for 2003 because we obtained --

19 THE COURT: Forget about talking about that right
20 now. Just tell me what figures he used to get here. You can
21 go back and deal with that in a minute.

22 MR. ROBERTSON: He adds up the accused revenue, he
23 applies appropriate compound factors.

24 THE COURT: Wait just a minute. Is that two and a
25 half billion dollars? Is that what it is roughly?

1 MR. ROBERTSON: 2.5 billion.

2 THE COURT: Two and a half billion dollars, and then
3 he did what?

4 MR. ROBERTSON: He does a compound factor because of
5 the value of money over time, and he does a discount value to
6 present value the future revenues. He comes up with a cash
7 flow of 1.24 million -- excuse me, 1.24 billion after he's done
8 that calculation. And then he divides the 37 million by
9 1.24 billion to arrive at effective rate of three percent in
10 that scenario.

11 THE COURT: Is there any indication in the license
12 agreement that that method was at all in the minds of the
13 parties, or is this just something he arrived at as a way to do
14 it?

15 MR. ROBERTSON: It's a way to -- there's nothing in
16 the agreement other than the agreement, Your Honor, is both for
17 past and future damages.

18 THE COURT: That's the best you can say. All right,
19 now, where in his report does he explain what you just told me,
20 what page?

21 MR. ROBERTSON: It's at page 12, I believe, Your
22 Honor. Exhibit 3-A reflects the amount of accused Ariba
23 revenue at issue in the license agreement with ePlus. The
24 Ariba license covered past and future accused sales.

25 Next full paragraph, accordingly, when converting a

1 lump sum royalty to a running royalty, the calculation includes
2 an estimate of the related revenues, a measure of a business
3 risk, measure of the risk related to the continuing relevance
4 of the technology. More specifically, a lump sum royalty is
5 essentially the present value at the time of the agreement of
6 the stream of related revenue accounting for discounts for
7 business and technology risks.

8 3-A-D show four calculations of the effective running
9 royalty rate in the Ariba agreement based on four assumptions
10 regarding the remaining effective life of the technology.

11 He drops a footnote as to what he calls extreme, or
12 as you refer to them, outlier assumptions, and then he uses
13 what he thinks is a more reasonable range.

14 THE COURT: All right, I see.

15 MR. ROBERTSON: He does the same exact calculation
16 for SAP explaining that it's slightly different because the
17 agreement occurred nearly two years after the Ariba agreement.

18 THE COURT: Where in the report does he explain that
19 this is an acceptable methodology in his field for doing what
20 he did? I see how he did it. Where does he explain, and what
21 does the record show that this is an acceptable methodology for
22 him doing what he did?

23 MR. ROBERTSON: I don't know that that exact language
24 appears in there.

25 THE COURT: It's not in there anywhere that I can

1 tell.

2 MR. ROBERTSON: I don't -- I do know that he was --
3 neither is it that it's acceptable that the *Georgia-Pacific*
4 factors govern the methodology. He didn't expressly say it,
5 but the law makes clear that you can convert them, and this, it
6 seems to me to be a reasonable way to convert them under
7 certain assumptions --

8 THE COURT: It may seem to you to be, but that's not
9 the test, what you assume to be. It's what's appropriate in
10 his discipline to do what he's doing, and -- ordinarily, people
11 recite that this is something that's done in their discipline
12 in doing this, and, for example, see textbook A, B, C, D of
13 Jones published in 1999, and I don't see -- just as an example.
14 I don't see any of this as an appropriate methodology
15 demonstrated in the report, and I just was asking if there is
16 any that I've missed.

17 MR. ROBERTSON: Your Honor, I think the methodology
18 is just math, and I think that is an acceptable -- for when he
19 understands as an economist I have to take something as a lump
20 sum and determine what the rate would be under various
21 scenarios, this is the math that would apply.

22 THE COURT: You know what? I can say that seven
23 divided by 2.5 is just math, but that doesn't mean it's the
24 right way to do the math. You have to demonstrate, he has to
25 demonstrate that it's appropriate to arrive at this calculation

1 that he used by using a compound factor and a discount factor
2 and why it's appropriate to do that in this context. I don't
3 see that he's done that. Is there a case, for example, that
4 establishes in the law that all of us are charged with
5 knowledge that the proper way to do this is to do it the way he
6 did it? I don't know of any, but if there is, tell me.

7 MR. ROBERTSON: Your Honor, you know, just through my
8 experience and apparently through his, he understands that
9 present valuing future revenues to today's dollars is an
10 acceptable methodology. Did he say that in his report? I
11 don't think I can point you to it, Your Honor.

12 THE COURT: Where does he say it's accepted
13 methodology to take the 2000 -- the kind of sales figure that
14 he did and assume that they're constant? Where does he say
15 that that's appropriate?

16 MR. ROBERTSON: He used the information that was
17 available to him.

18 THE COURT: That's not sufficient, because he could
19 have gotten the information off the street. He could have
20 walked out and found ten pieces of paper on the ground and
21 said, I used the information available to me. I know he didn't
22 do that, but that isn't a sufficient explanation.

23 MR. ROBERTSON: Respectfully, he could not have done
24 that, Your Honor. This was accused revenue of both SAP and
25 both Ariba. That information --

1 THE COURT: My point is -- that rationale isn't
2 explanatory. You say that as if that's the end of it all. He
3 used what was available to him. That's not the answer. The
4 answer is, why did he -- he's got to explain, I think, why did
5 I pick 2003 as the basis for my assumption down here in
6 footnote A, for example, of Exhibit 3-A. Does he do that
7 somewhere?

8 MR. ROBERTSON: That's when the infringement started,
9 when the Ariba suit was filed. That was the period of time he
10 could reach back for damages, so he assumed that that was the
11 start of the revenue stream for the royalty, the date that
12 the --

13 THE COURT: Did he say that?

14 MR. ROBERTSON: He may have, Your Honor. I have not
15 committed this completely to memory.

16 THE COURT: Damages is the single most important part
17 of a case, at least to the client. So I am sorry if I have
18 pressed on this more than perhaps I should, but I don't
19 understand the man's method. He just seems -- it almost is as
20 if his report says, I'm an expert and dress well, have a good
21 head of gray hair, and, therefore, you ought to believe me.
22 That's exactly what *Daubert* says can't be done.

23 MR. ROBERTSON: All I can say, Your Honor --

24 THE COURT: All right. Excuse me.

25 MR. ROBERTSON: -- is that if you use the methodology

1 that he was told by a higher court to employ, there are factors
2 and weighed them --

3 THE COURT: He was told by a court to do this?

4 MR. ROBERTSON: Yes, Your Honor.

5 THE COURT: What court told him to do this?

6 MR. ROBERTSON: The Federal Circuit has repeatedly
7 said, this is the appropriate methodology for determining
8 patent damages. I mean, if he were not to use it, he'd
9 probably be faulted for not employing the standard
10 *Georgia-Pacific* factors.

11 THE COURT: This isn't a *Georgia-Pacific* issue. This
12 is how you get to -- this is how you get to the part of your
13 analysis of one of the *Georgia-Pacific* factors, and no court
14 that I know of has ordered that a particular method be used to
15 do that.

16 All right, let's go to the next motion. Now, on one,
17 two, and three, I'm going to reflect upon what you've said, but
18 I'm going to tell you, I'm very suspect of Dr. Mangum, of the
19 ability of Dr. Mangum to be able to testify because of the
20 reliability factors here. So you all can start thinking about
21 that and how that affects your case and what you want to do
22 with it in proving what you're going to prove.

23 I feel like -- I'll try to get an opinion out as soon
24 as I can, but it's not going to be for a week or so, but at
25 least you now know that in getting ready for trial, it may very

1 well be that you don't have Dr. Mangum's report. And you may
2 not have it because of the questionable and unexplained
3 methodology and some of the reliability factors that we have
4 identified here today. That will be what keeps it out if it is
5 out.

6 I don't see that the *Sinclair* case deals with running
7 reasonable royalties. Did somebody read it differently? Maybe
8 we got the wrong *Sinclair* case. Did you all give -- did we get
9 it and get the cite, or did you all give it to us?

10 MR. ROBERTSON: We gave it to you, Your Honor. It
11 had to do with this issue about the wisdom of looking forward
12 to events that occur afterwards to factor into -- the issue was
13 whether or not a license agreement that occurred in the future
14 could be relevant to a hypothetical negotiation that occurs in
15 the past.

16 *Sinclair* case was the first case that announced the
17 book of wisdom that said you may look forward as if you're
18 omniscient to see these things and apply them to events that
19 occurred in the past. It was applied in the *Fromson* case in a
20 patent case, and it was applied in the *Dart* case specifically
21 with respect to the Phillips license that was used -- the
22 Phillips settlement agreement that was used for determining an
23 appropriate royalty even though it was ten years after the
24 negotiations, the hypothetical negotiations would have
25 occurred.

1 So it's the first case announcing the book of wisdom
2 which then was followed in *Fromson* in the context of
3 understanding what information can be used during hypothetical
4 negotiations, followed again in *Dart* in the specific
5 circumstances we were talking about in this case, Your Honor,
6 as to later settlement agreements that are used for earlier
7 hypothetical negotiations.

8 THE COURT: All right. I see the point. Okay. What
9 is the next one? Plaintiff's motion *in limine* number two.
10 ePlus, you're up.

11 MR. ROBERTSON: Your Honor, there was Lawson motion
12 *in limine* number five.

13 THE COURT: I haven't finished. I'm just shifting
14 gears. ePlus number two.

15 MR. ROBERTSON: Your Honor, if you have the slides in
16 front of you, this has to pertain again to Dr. Shamos's
17 reports, the second Court-ordered supplement and validity
18 statements and his infringement report or non-infringement
19 report. If we can go to slide number two, Your Honor, I just
20 wanted to sort of briefly revisit the chronology.

21 You will recall that the Court had ordered Lawson to
22 file a second supplemental invalidity defense on March 29th,
23 and on April 9th, Lawson served us with the Court-ordered
24 supplemental invalidity statement. On May 5, we then received
25 Dr. Shamos's report which expanded the number of prior art

1 references, accommodations, and the various theories that he
2 was espousing with respect to invalidity.

3 We filed a motion to strike. We had a hearing that
4 lasted almost three hours on May 24, and the Court issued an
5 order from the bench that afternoon and then issued a written
6 order the following day, and then ordered further briefing
7 going forward on the issues of -- the limited issue of whether
8 Lawson's version five and version six could be used for very
9 limited purposes with respect to two claim elements --

10 THE COURT: I believe those were issues in which I
11 decided at the hearing on one of the Lawson systems that it --
12 accepted Lawson's argument that the claim construction had made
13 it necessary for them to put up a different defense or put up
14 that defense which they had left out earlier.

15 MR. McDONALD: Right.

16 MR. ROBERTSON: I understand, Your Honor, that you --

17 THE COURT: That's what the order did, and it let
18 them have one of them and told them to brief one that Mr.
19 McDonald couldn't come up with the explanation at the hearing,
20 and I said, I thought better of striking it after I left here
21 and said I would let him brief it.

22 MR. ROBERTSON: That's correct, Your Honor. And we
23 did brief it, and you gave us until June 4 to do a rebuttal
24 brief. So with respect to that one element from one claim of
25 the '683 patent that involved the searching for matching items

1 in the database, you reserved on the issue of whether the
2 Lawson 5.0 and 6.0 could come in for one additional limited
3 purpose on the building requisitions using the data related to
4 the selecting matching items.

5 THE COURT: And in that order, I reserved for
6 judgment on J-Con and what else?

7 MR. ROBERTSON: Your Honor, rather than have me read
8 it to you, I can hand it up to the Court if you'd like. You
9 reserved, Your Honor -- you are absolutely right -- in
10 subsection eight on new documents on just J-Con and Gateway.

11 THE COURT: J-Con and Gateway.

12 MR. ROBERTSON: Yes. Your Honor, after this order
13 and after the Court instructed us to brief it, during the
14 middle of the briefing, we received the non-infringement report
15 of Dr. Shamos. So this is after, more than a month after his
16 invalidity report in the context of a non-infringement report,
17 after Your Honor has issued this May 25 order limiting the
18 version five and six for just one purpose and opening briefing
19 on another purpose, Dr. Shamos took from his invalidity report
20 nearly verbatim 15 paragraphs on Lawson prior art systems,
21 alleged prior art systems 5.0 and 6.0, and placed them in his
22 non-infringement report.

23 THE COURT: Are they being offered -- is it your
24 position that Lawson is offending in respect of the invalidity
25 issue or using the infringement issue as a vehicle to get in as

1 to which his opinion is not relevant but getting it in by the
2 back door? Which is it?

3 MR. ROBERTSON: Both, Your Honor. I think it
4 violates the Court's order, and I think it violates the Court's
5 order because it's trying to get it in through the back door.

6 THE COURT: As I remember the original -- it was
7 something like four different theories of invalidity; right?

8 MR. ROBERTSON: In this case, Your Honor?

9 THE COURT: Originally.

10 MR. ROBERTSON: As far as I know, there are at least
11 a dozen or so and 41 different combinations of obviousness that
12 were not in the original supplemental -- second supplemental
13 court-ordered invalidity statements.

14 THE COURT: That's not what I asked you.

15 MR. ROBERTSON: I'm sorry, sir. There were more than
16 four, so I'm missing a point, and I apologize.

17 THE COURT: 14, I'm sorry. There were a total...

18 MR. ROBERTSON: The Court narrowed it down
19 specifically, but what we're very concerned about is this
20 Lawson 6.0 and 5.0 systems that the Court took a considerable
21 amount of time to say for invalidity purposes they were limited
22 to one claim element and perhaps two after the Court reviewed
23 the additional briefing it ordered.

24 And after that, we received this Shamos
25 non-infringement report, and he is taking his invalidity

1 contentions with respect to these 5.0 and 6.0 systems and
2 inserted them into a non-infringement opinion. So the question
3 way, why did he do that, and if you go -- and you'll see on
4 slide six, I've just -- I provided you with the various
5 paragraphs in both the non-infringement report and the
6 invalidity report that correspond, and I've got just one
7 example here you'll see that tracks virtually verbatim.

8 Now, Your Honor, we couldn't respond, we didn't
9 respond to his invalidity contentions on 5.0 and 6.0 because
10 you ruled that they couldn't come into evidence except with
11 respect to those two particular narrow issues. And we did
12 respond to that. But we took the Court's order at face value
13 and said, we don't need to respond to all these invalidity
14 contentions because they are out of the case now.

15 And so we were surprised when on the same day we're
16 submitting our invalidity report not addressing all these
17 Lawson 5.0 and 6.0 issues, they suddenly show up in the
18 non-infringement report. So we took Dr. Shamos's deposition,
19 and if you go to the next slide, why did Dr. Shamos do it? We
20 asked him that. He said, it, of course, has to do with
21 invalidity.

22 Now, why are we prejudiced? Why is it manifest
23 prejudice? We now can't address these things because they were
24 supposed to be out of the case. We filed our invalidity
25 report. They show up again in the non-infringement report, and

1 he expressly avows on June 16th it's for that very purpose, to
2 backdoor my invalidity opinions that were struck by Judge Payne
3 through my non-infringement report.

4 Now, we think that's just wholly improper, and so
5 what's gone on now, Your Honor, is there's been lots of
6 arguments made, well, okay, they are relevant to other
7 purposes, and we really don't think that's actually --

8 THE COURT: Isn't that the whole issue that they
9 present, is that these opinions are relevant to other purposes?
10 Isn't that their reason for doing this?

11 MR. ROBERTSON: We don't believe so, Your Honor.

12 THE COURT: Isn't that what they said in their brief
13 as their reasoning for doing it?

14 MR. ROBERTSON: They say there's reasons because
15 they're relevant to willfulness is one argument.

16 THE COURT: Relevant on the issue of damages, lack of
17 specific intent to induce infringement, and lack of willful
18 infringement. They're also relevant to infringement, at least
19 because Lawson should be entitled to use systems -- use the
20 system to rebut and discredit ePlus's infringement and damages
21 contention. That's where the issue is joined, isn't it?

22 MR. ROBERTSON: Well --

23 THE COURT: They abandoned now, I think, the notion
24 that what they did was okay. They're just saying it's another,
25 other reasons for getting it in.

1 MR. ROBERTSON: I can address those other reasons,
2 but Dr. Shamos's professed reason for getting it in is for
3 invalidity purposes. So I would hope and expect that Dr.
4 Shamos won't be taking the stand and making arguments with
5 respect to 5.0 and 6.0 for invalidity purposes other than in
6 the limited manner the Court has permitted. But, you know --

7 THE COURT: Dr. Shamos isn't going to be making any
8 arguments at all, and if he does, he'll be asked to step
9 outside.

10 MR. ROBERTSON: I would hope he would not be
11 attempting to give testimony with respect to invalidity based
12 on the version five and six. What concerns me, Your Honor, is,
13 one, what you've just read is entirely conclusory without any
14 analysis really as to why it might be relevant to willfulness,
15 why it might be relevant to these indirect infringement issues,
16 why it's relevant to damages, and why it would be in a
17 non-infringement report, for example.

18 He's not a damages expert, and he's not testifying on
19 willfulness any longer, Your Honor. So we don't think it
20 should come in for that, but we are also concerned with the
21 prejudice that the jury sees this and misapprehends the purpose
22 for which this is offered, but let me address these issues that
23 they've raised with respect to willfulness, for example.

24 Willfulness focuses on Lawson's objective
25 recklessness or their state of mind, their intent. What

1 relevance does it have that back in 19 -- prior to 1994, they
2 had some systems that they no longer use and haven't used for
3 years as to their state of mind or as to whether or not they
4 had an objective recklessness.

5 We're not accusing those systems of infringing, and
6 they haven't moved back to those systems in 2010, nor could
7 they according to the 30(b)(6) witness who we deposed. You
8 can't go back in time and ask people to pay hundreds of
9 thousands of dollars to move back to a technology that has
10 become completely obsolete.

11 So we believe under any of the law that would apply
12 to the issue of willfulness, the 5.0 and 6.0 systems just have
13 no relevance whatsoever. Certainly products in the early '90s
14 are not relevant to whether it willfully infringed starting in
15 2002.

16 As to indirect infringement, again, this all has to
17 do with Lawson's actual knowledge of the patent in suits which
18 they claim, although the law actually says deliberate
19 indifference is now enough, or whether or not the infringer
20 knew his actions would induce the infringing acts or knew that
21 his actions would induce -- or should have known that they
22 would induce actual infringement.

23 The possible relevance that a system from the early
24 '90s have to whether or not they had that proper intent in 2002
25 and going forward, how does that negate that in any way? It's

1 just a complete non sequitur in our view.

2 On the nine infringing alternatives, again, this is a
3 situation where their customers paid hundreds of thousands of
4 dollars, and it takes months, sometimes as long as a year, to
5 implement this software. No one is going to go in the 2000 to
6 2003 time frame and go back to obsolete software from the
7 '92/'93 time period, much of which had to be done on mainframe
8 computers in the version 5.0 according to their witness.

9 And we asked that question, could they have gone
10 back, for example, using 9.0 today and go back to use procuring
11 modules for 5.0.

12 Answer: We've never done that for a client.

13 And you never would; correct?

14 No, it wouldn't be good business practice.

15 So, Your Honor, I don't understand how it can be used
16 for non-infringing alternatives, but if that's the instant, it
17 should be showing up in a non-infringement report of a
18 technical expert.

19 THE COURT: What about the J-Con and the Gateway?

20 MR. ROBERTSON: Well, Your Honor, we think that
21 they've raised the issues --

22 THE COURT: J-Con and Gateway you oppose because they
23 were new to beyond -- in fact, they were in the original
24 contentions and dropped them, didn't they?

25 MR. ROBERTSON: Well, they were not in the original

1 contentions. If you go to -- I'm sorry, Your Honor, skipping
2 around here. If you go to slide five, these were the new
3 Shamos invalidity theories based on J-Con, Gateway, PO Writer,
4 the King patent, all of which were not in the second
5 supplemental statement and are now in the Shamos report.

6 In addition, he relied on other documents that had
7 never been applied before in addressing these things. I think
8 we spelled it out fairly clearly in one of the attachments.

9 THE COURT: All right.

10 MR. ROBERTSON: So we would ask that they not be able
11 to rely on this. In fact, I think it's summarized in the
12 relief sought which is page 12 of our outline. Thank you.

13 THE COURT: Who is going to do this? Hello.

14 MS. STOLL-DeBELL: Let's go to slide 57. So we think
15 there are four reasons why you should deny their motion *in*
16 *limine* number two. The first is that the evidence that they're
17 seeking to strike and preclude is relevant to issues other than
18 invalidity, and I'll get into all of these in detail. This is
19 sort of a summary of where I'm going.

20 The second is that we did disclose J-Con and PO
21 Writer and Gateway and the King patent in the second
22 supplemental invalidity contentions. It's not new prior art.
23 It was all set forth in there.

24 Now, Dr. Shamos took a slightly different view of how
25 that invalidated their claims, and he thought that it

1 invalidated or anticipated more of the claims. We said 103, he
2 said 102, but all of those references were disclosed in that
3 second supplemental invalidity contention, and I'll get into
4 that as well.

5 Regarding some of these manuals, the Gateway and the
6 J-Con manuals that Dr. Shamos included in his claim chart that
7 were not cited in our second supplemental invalidity
8 contentions, I think that's just new evidence in support of old
9 theories, and this Court is allowing Dr. Weaver to rely on
10 hundreds of pages of new evidence in support of old theories.

11 THE COURT: I'm not quite sure that one is right. I
12 think -- they showed how that's the case with Weaver, but your
13 man Shamos is talking about a bunch of new anticipation --
14 claims that are anticipated, and what you originally did, the
15 number of claims that were anticipated in your second
16 supplemental was one by the J-Con, three by Gateway, seven by
17 PO Writer, three by King 542, total of 14.

18 Your man Shamos says 13 each in J-Con, Gateway, and
19 PO Writer, and 11 in King 542 according to them, and, frankly,
20 that's sort of what that looks like to me, that Shamos did, and
21 if that's what he did, he can't do that.

22 MS. STOLL-DeBELL: So, yes. In our second
23 supplemental invalidity contentions, we said some of those
24 claims were rendered obvious in light of those references in
25 combination with other references, and Dr. Shamos did take a

1 slightly different view and felt like there actually was
2 anticipation.

3 THE COURT: He did it to 13 -- instead of -- for
4 J-Con he did it to 13 claims, not one, and he can't do that.
5 So we understand where we're going, at the beginning of this
6 case, I issued an order and directed that infringement
7 contentions and validity contentions be disclosed.

8 That wasn't for the purpose of making an opening bid.
9 That was for the purpose of setting the course of this case.
10 It is a case management order. It says, this is how -- where
11 you are to focus your discovery, et cetera.

12 You all needed a little second bite at the apple, and
13 I gave it to you, and I think you actually dropped something
14 from your original invalidity contentions and shifted it a
15 little bit, but you made them, and you made them as I think
16 ePlus has described in its brief.

17 And now this man, Shamos, comes in at the expert
18 stage and under the guise of saying that he is using additional
19 rationale to explain the original 14 issues that you all
20 posited in your invalidity contentions, he's doing it as to
21 about 50 claims, and that cannot be done. And it's that issue,
22 I think, you need to demonstrate to me, and I don't see your
23 brief as seriously saying that he's doing anything other than
24 that.

25 MS. STOLL-DeBELL: I would characterize it as

1 changing the argument from 103, which is what we said in our
2 second supplemental invalidity contentions for some of the
3 claims, to a 102 argument. But if you are asking me --

4 THE COURT: But didn't he do it to more claims, for
5 example?

6 MS. STOLL-DeBELL: Well, he says more claims were 102
7 where we had said they were 103.

8 THE COURT: I know, but you can't do that. That's
9 the point. I believe that Dr. Shamos believes that he runs the
10 operations around here, and he doesn't. He's going to abide by
11 the rules that are set by the Court. So I'm troubled by what I
12 see there.

13 MS. STOLL-DeBELL: As a technical expert, we hired
14 him for his technical expertise, and he looked at the
15 documents, he looked at the prior art, he looked at the claims,
16 and he gave his opinion as to what he thought -- the reasons he
17 thought they invalidated the claims.

18 THE COURT: That's fine, but he could have given them
19 to you until the cows came home, and you could have done with
20 them what you wanted to, but you and your client are
21 circumscribed by the basic rules that you operate in, and you
22 should have said to him, Doctor, you have expanded the game,
23 we're not playing seven-man football like we started off with.
24 We're playing with 11, and the Court said you can't do that, so
25 go back and give us a report that deals just with what we said,

1 and if you can't say that, then we'll -- you know, that's okay,
2 we'll have to figure out what to do, but you just do what
3 you're supposed to do. You don't come in here and do what he
4 did, I don't think.

5 MS. STOLL-DeBELL: To be fair, Your Honor, we're
6 taking about his invalidity report which was filed before they
7 filed their motion to strike and before Your Honor ruled on
8 their motion to strike.

9 THE COURT: I've already said, told you all at the
10 beginning that you were supposed to do these things, and that's
11 what they mean, but when you're told to do something, the
12 limits are there. You don't have to be -- we don't have to do
13 it any other way, I don't think.

14 MS. STOLL-DeBELL: Okay. So going back to -- I think
15 we've covered that issue. Going back to the relevance to other
16 issues, talking about this prior art --

17 THE COURT: How is the prior art relevant to other
18 issues?

19 MS. STOLL-DeBELL: Let me first start off by saying
20 that the May 25th order that you issued was not, did not relate
21 to any of these other issues. It was specifically related to
22 invalidity, and, further, it was granted in part and denied in
23 part as you mentioned earlier.

24 THE COURT: That's entirely correct, and I don't
25 think there's any question about that.

1 MS. STOLL-DeBELL: I think -- I keep hearing from
2 ePlus that we are violating the order and we're going against
3 the order because we want to use this information for issues
4 other than invalidity, and so I just want to point out again
5 that that issue, that motion and the order were related to
6 invalidity.

7 THE COURT: That's right.

8 MS. STOLL-DeBELL: We do, in fact, want to use this
9 evidence for other issues --

10 THE COURT: But how is it relevant, how does it
11 pertain to other issues?

12 MS. STOLL-DeBELL: Okay, well, I think the real key
13 here, Your Honor --

14 THE COURT: How does the prior art, for example,
15 relate to damages which is the first matter that you assert in
16 your brief?

17 MS. STOLL-DeBELL: I think a fundamental thing to
18 understand here, which explains why it's relevant to all of
19 these different issues, is what ePlus is saying infringes in
20 this case and what they are saying does not infringe.

21 And so they draw this line in the sand starting in
22 2002, and they say Lawson's version 8.0.3 began the
23 infringement, and that began in 2002. You've heard that date
24 all day today, and that all prior versions of the same
25 software, this S3 procurement software, did not infringe. So

1 we've got this line, everything before 8.0.3 does not infringe,
2 and everything after it does.

3 So what we're looking here for, non-infringement, for
4 example, Dr. Weaver says that there were two changes made to
5 the software, 8.0.3, that triggered the infringement in this
6 case. Those are that it allowed key word searching, and it
7 allowed searching by these UNSPSC codes or category searches.

8 Those are the things that triggered infringement,
9 that caused it to go from non-infringing to infringing. And so
10 what we want to do is go back and look at our software prior to
11 2002, which has, frankly, been the same going back to the early
12 '90s, going back to version five, and say, it's substantially
13 the same as version 8.0.3. So, Dr. Weaver, if you say that,
14 you know, this infringes and the other one doesn't, they're the
15 same, and we'll use that to impeach him, to attack the
16 credibility of his opinions.

17 THE COURT: How does it relate to damages?

18 MS. STOLL-DeBELL: Damages, okay. One of the things
19 that you look at when deciding, when figuring out what that
20 reasonable royalty is going to be, what alternatives were
21 available to Lawson in 2002, what non-infringing alternatives
22 were available that it could have used instead of the
23 infringing technology, because if there are viable alternatives
24 out there, it's going to be less likely to pay a higher
25 royalty, so you factor that in. You have to look at what was

1 available. Certainly Lawson's been selling this same software
2 for decades --

3 THE COURT: I thought your man testified that you
4 couldn't go back, you couldn't go back and you wouldn't go back
5 because it's bad business, and if you can't go back and you
6 won't go back because it's bad business, the mere fact that in
7 concept it's a non-infringing alternative doesn't make a
8 difference which your folks already made the decision they are
9 not going back.

10 MS. STOLL-DeBELL: I don't think that's fair, and I
11 don't think that's accurate. What our witness was asked is, in
12 2010, could you take version 9.0 and switch it out for version
13 5.0. No, you couldn't, but 2010 is not the relevant date.
14 It's 2002, and in 2002, there was still a version 6.0 software
15 out there. It was an available alternative at the relevant
16 date which is at the time that the hypothetical negotiation
17 would happen.

18 THE COURT: How does it have to do with willful
19 infringement?

20 MS. STOLL-DeBELL: Because, Your Honor, Lawson has --
21 they've been selling the same software for years, since well
22 before the filing date of these patents, and it further
23 believes that the software that it sells today, the
24 functionality is substantially the same as it's been selling
25 since the early 1990s.

1 That shows, it is evidence that Lawson doesn't intend
2 to infringe, and, further, that there is not an objectively
3 high risk that Lawson's infringing a valid claim of ePlus's
4 patents and that there's not subjective intent either.

5 It's a very similar issue for indirect infringement.
6 Lawson doesn't think it infringes because it's been doing the
7 same thing since before ePlus, and it doesn't intend for its
8 customers to infringe either, because, again, it isn't doing
9 anything different.

10 THE COURT: Okay. Anything else?

11 MS. STOLL-DeBELL: Yes. If you'd let me look through
12 my notes really quick. They raise an issue as to the Gateway
13 system, and they say that Dr. Shamos should be limited to
14 relying on the Gateway system as prior, a prior art printed
15 publication under Section 102(b).

16 In Dr. Shamos's report, and if we can go to slide 70,
17 he did, in fact, list the subsections of 102 that he was
18 relying on for each of these different types of prior art, but
19 it was not an exhaustive list. So he said, you know, these
20 references qualify as prior art at least under these
21 subsections.

22 It's further our view that Dr. Shamos is not in any
23 better position than the jury to determine whether a system
24 qualifies for prior art. We're going to put witnesses on the
25 stand who will talk about when things were on sale, whether

1 they were in public use, when that happened, what the documents
2 say, whether they are printed publications. All of that stuff
3 is fact issues that fact witnesses will put evidence on, and
4 the jury will have to decide that. That's not Dr. Shamos's job
5 to do that. His job is to look and see what is disclosed in
6 these references, compare it to the claims, and give an opinion
7 as to whether they anticipate or render obvious these things.

8 Further, in his claim chart -- so I would say
9 although he did say printed publications for Gateway in his
10 report, he shouldn't be limited to that specific subsection,
11 and in his claim chart that he produced with his report, he
12 talked about the Gateway system, and he cited multiple
13 different documents to show what that Gateway system had at the
14 relevant time period. We would ask he be permitted to give
15 opinions on that as well.

16 THE COURT: All right. Thank you. We'll take a
17 20-minute recess, and then we'll come back, and I'm inclined to
18 believe that the number five -- what is it - V5 and V6 systems
19 may be appropriate for means for -- may be made appropriate
20 because of construction of means for building requisition using
21 data related to selecting matching items and their associated
22 sources, and you might tell me how that affects this motion.

23 Otherwise, I'm inclined to believe that what is in
24 those invalidity reports is what he testifies to, and that's --
25 and he can't bring in something that he claims is an invalidity

1 ground under the guise of other things, other opinions.

2 There are a couple of other loose ends that need to
3 be tied up, but you frame your argument and address these
4 issues.

5

6 (Recess taken.)

7

8 THE COURT: Have a seat, Mr. Robertson. Excuse me
9 just one minute. I am -- it's getting late in the afternoon,
10 and I think I misspoke myself when I left, so I want to make it
11 clear.

12 An opinion will be issued, brief though it be. I
13 don't believe that Lawson carried its burden to show that the
14 construction-of-means-for-building term that was left open
15 changed the rules of the game or called for further opinion,
16 and so the issue that was left open, that aspect of the relief,
17 Lawson's request to have an extra opinion on the V6 and V5 will
18 be denied. I think I said exactly the opposite of that when I
19 left here, and I didn't mean that, but that's what I do mean.
20 Now, where do we go?

21 MR. ROBERTSON: Thank you. I'll be brief in
22 responding to a few of these things. Number one, I actually
23 thought I heard counsel say that because Dr. Shamos actually
24 opined with respect to one Gateway manual as a prior art
25 printed publication, that now we opened the door for him to

1 opine on things he didn't even include in his report such as a
2 prior public use with respect to the Gateway system.

3 That would go even beyond what Dr. Shamos has already
4 said in his report, and I can show it to you with respect to
5 this Gateway manual because I have his report right here if
6 you'd like me to show you, but I can just identify that in his
7 prior art reference at page 26 with respect to the Gateway
8 2000/MRO version, what type of prior art he says, 102(b)
9 publication.

10 So I certainly wouldn't want to have a situation --
11 not have a situation where simply because he identified
12 something as a publication, he then gets to start pulling in
13 and opining on issues as to prior public uses when he's never
14 identified those before. Can we see slide 11?

15 THE COURT: What are you on there?

16 MR. ROBERTSON: Slide 11 of our motion *in limine*, tab
17 two. This is just to illustrate that Dr. Shamos's sole opinion
18 with respect to the Gateway system was this one manual, and
19 when you are dealing with a printed publication as
20 anticipation, which this is, all of the elements need to be
21 anticipated within a single printed publication, a single prior
22 art reference, in other words within the four corners of the
23 document.

24 He's now trying to identify all these other
25 publications that don't qualify as 102(b) prior art because

1 they are published less than one year prior to the filing date
2 of our patents, and I heard counsel argue that he now also
3 wants to opine on a prior public use which he's never even
4 identified in his report. So I was hoping we were contracting,
5 not expanding. That was my only point, Your Honor.

6 With respect to some of these arguments about why
7 Lawson 5.0 and 6.0 should come in for these other reasons, I
8 did not find them persuasive. In fact, I really saw them as
9 just stealth arguments that they really apply to invalidity.
10 Even the argument made with respect to non-infringement was,
11 well, there's only a couple of alleged new elements Dr. Weaver
12 testified about. Of course, his expert report goes well beyond
13 those two elements that were identified there, not the least of
14 which is the multiple catalog aspect which is not present in
15 5.0 and 6.0.

16 THE COURT: You mean Dr. Shamos?

17 MR. ROBERTSON: No, Dr. Weaver. Did I misspeak? Dr.
18 Weaver opined well beyond -- this was slide 62 of Lawson's
19 presentation about the two changes that triggered infringement.
20 His report goes well beyond keyword searching and searching by
21 categories and UNSPSC codes. And so what this is really
22 arguing is, well, these are only the new elements and really,
23 you know, that would mean that Lawson 5.0 and 6.0 render it
24 obvious.

25 THE COURT: You say you don't contend that 6.5 and

1 five infringe; right?

2 MR. ROBERTSON: That's correct, for a variety of
3 reasons, Your Honor.

4 THE COURT: But did you allege that in your
5 complaint, that they didn't infringe?

6 MR. ROBERTSON: We did not identify them in our
7 infringement contentions because we don't believe --

8 THE COURT: No, I didn't ask you that. I asked you
9 if you alleged in your complaint that they didn't infringe. In
10 other words, is that in play in the case already because you
11 put it into play in your complaint?

12 MR. ROBERTSON: I'm fairly confident that we did not.
13 The patents didn't issue until 1994, and those predate the
14 patents, so we couldn't accuse something that predates the
15 filing date of the patents.

16 THE COURT: How did you put it in issue?

17 MR. ROBERTSON: How did we put it in issue?

18 THE COURT: Yeah. How did you put it in issue? They
19 want to rebut something -- they want to use this to rebut
20 something that you are contending. So you're not contending
21 anything about the 6.5 at all in the case. You're not offering
22 evidence about it at all.

23 MR. ROBERTSON: Not at all, Your Honor. In fact,
24 you're going to hear from Ms. Albert today that a demonstration
25 they put on of the alleged 5.0 and 6.0 system is a doctored

1 system that they re-created well after the fact. It has source
2 code after the fact, and it has hardware and middle ware and
3 operating systems well after the fact, and we think that
4 actually shouldn't come into evidence. So we certainly -- I
5 didn't mean to suggest in any way that we ever put it into
6 play.

7 THE COURT: You didn't. They did.

8 MR. ROBERTSON: We want it fully excluded, sir.

9 THE COURT: Well, they seem to say that because you
10 acknowledge 6.5 and five don't infringe, it's okay for them to,
11 on the topic of damages, to show a non-infringing alternative
12 and willful infringement to show their state of mind to prove
13 up that the -- is it 8.0.3?

14 MR. ROBERTSON: 8.0.3.

15 THE COURT: Yes, 8.0.3, and the six, V6 and V5 are
16 substantially the same and that they ought to be permitted to
17 prove that. What do you say about that?

18 MR. ROBERTSON: I don't understand how substantially
19 the same goes to their state of mind whether -- for a product
20 system that was on sale in the early '90s goes to their state
21 of mind in 2002 as to whether or not they're willfully
22 infringing the patents, because they don't have all the
23 elements, and, otherwise, they're offering it really for
24 invalidity, and that's where unfair confusion, I think, will
25 arise.

1 It hasn't been accused in the infringement. For that
2 matter, then why isn't 7.0, 8.0, 8.01, and 8.02 at issue? In
3 fact, those would be closer in time to the hypothetical
4 negotiation and the relevant state of mind. But they're really
5 offering 6.0 and 5.0 for the very reasons that Dr. Shamos
6 conceded in his deposition. They want them in for invalidity
7 purposes. That's all I have on that, Your Honor. Thank you.

8 THE COURT: Do you have anything to say? It's not
9 your motion, but since I did what I did on the outstanding
10 issue, you can say what you need to say.

11 MS. STOLL-DeBELL: First of all, Your Honor, they did
12 put it into issue as part of their damages case by saying
13 infringement started in 2002, and it started with this version
14 8.0.3, and they have said on the record both with Dr. Weaver,
15 their technical expert, and their damages expert, that that is
16 what infringes going forward and what was prior to that does
17 not.

18 And so when we're talking about the infringement
19 issues and damages, it's not just 5.0 and 6.0 that we're
20 talking about. It's everything prior to 8.0.3, and Dr.
21 Shamos's expert report talks about how Lawson's S3 software has
22 really been substantially the same starting at version five and
23 coming to present day. So it's not just limited to five and
24 six.

25 And I would further say that this isn't an invalidity

1 argument in disguise because we're talking about 2002. We're
2 not going all the way back to 1994, and what we want to do is
3 compare what they say is infringing and the things that they
4 say triggered infringement against what they say doesn't
5 infringe.

6 THE COURT: How do you see this evidence playing out?
7 I'm having trouble understanding it in respect -- the only
8 thing, I think, that is even colorable is the state of mind on
9 the willful infringement. I don't think it shows any
10 non-infringing alternatives in this case. Time is too distant
11 to be able to do that. But beyond that, I just don't see how
12 it shows any non-infringing alternative but to say that I
13 didn't intend to infringe when I did 8.0.3 because all I
14 thought I did was change from V6 and V5 in our previous
15 versions to 8.0.3, and, therefore, I really didn't have any
16 intent to infringe. Isn't that your point of what you're
17 trying to prove, it wasn't willful, it was just one of those
18 things?

19 MS. STOLL-DeBELL: Are we talking about willfulness?

20 THE COURT: Yes.

21 MS. STOLL-DeBELL: You have to compare it or contrast
22 it with somebody who didn't have prior software. I think of it
23 as the opposite of copying, really.

24 THE COURT: I'm asking you how you're planning on
25 putting this evidence on so I can understand what relevance it

1 has, because the papers don't show that.

2 MS. STOLL-DeBELL: Well, I think we'll have Lawson
3 witnesses get on the stand. We've got witnesses with personal
4 knowledge about --

5 THE COURT: I assume they know all the systems. What
6 are they going to do?

7 MS. STOLL-DeBELL: They're going to get on and talk
8 about how the systems are the same and that there was keyword
9 searching in the earlier versions of Lawson's system and there
10 was category searching.

11 THE COURT: And then where do we take that?

12 MS. STOLL-DeBELL: Well, then we use it to impeach
13 Dr. Weaver who says these things triggered infringement, these
14 are changes. We don't think they are changes, Your Honor.

15 THE COURT: You're really not going to the state of
16 mind. You're going to the substantive issue of infringement
17 vel non, and what you told me is that it didn't go to the issue
18 of willful infringement, i.e., their state of mind.

19 MS. STOLL-DeBELL: I'm sorry. I'm probably missing
20 the issues up here. As far as state of mind goes, we will have
21 Lawson witnesses up there saying, we didn't think we did
22 anything wrong and we didn't think there was a high risk of
23 infringing a valid claim because we've been doing the same
24 thing that we've always done. There's nothing new in this
25 version 8.0.3 that we weren't doing before, so how can we be at

1 high risk of infringing a claim when we're doing the same thing
2 we've always been doing.

3 THE COURT: That doesn't have any value unless its
4 shown that five and six and before didn't infringe.

5 MS. STOLL-DeBELL: They say it didn't infringe, Your
6 Honor.

7 THE COURT: Is that correct or not? That doesn't
8 have any probative value to state of mind without a showing
9 that V5, V6, and the other systems didn't infringe, does it?

10 MS. STOLL-DeBELL: Well, I think the showing is --

11 THE COURT: On that point.

12 MS. STOLL-DeBELL: Their witnesses will say they
13 don't infringe. Their damages expert is going to say they
14 don't infringe, so they admitted --

15 THE COURT: They're not going to put on evidence
16 about what doesn't infringe. That's going to be part of your
17 case. They're not going to be allowed to testify that V5 and
18 V6 don't infringe and anything else doesn't infringe. There's
19 a zillion things in the world that don't infringe. They're not
20 going to put on a case like that.

21 That's part of your case if it's part of the case at
22 all, so when you get to -- you are arguing to me that this is
23 relevant to show that they didn't intend to infringe, and I
24 assume the argument is this: We just thought we were
25 continuing what we did before. Isn't that right? Isn't that

1 basically what this whole argument boils down to, and from that
2 you want to argue that -- from that fact you want to argue that
3 because what they did before didn't infringe, the infringement
4 here, if it's shown, couldn't be willful; right? Isn't that
5 what you want to do?

6 MS. STOLL-DeBELL: Yeah, I mean, I think when you are
7 talking willful infringement and intent, you have to look at
8 was there this high risk of infringement and did they act
9 despite a high risk of infringement. That's sort of the
10 subjective inquiry that we're looking at.

11 THE COURT: I understand that, but they can't get on
12 the stand and say, I didn't act, there wasn't a high risk of
13 infringement in my mind unless they actually knew about the
14 infringing product and said -- I mean the patent, excuse me,
15 and then said, hey, I looked at that, and I didn't think it was
16 any risk of infringement.

17 So that's not how you put that on. That's not how
18 you do what you're trying to do, I don't think, and I'm trying
19 to get from you how you're going to use this.

20 MS. STOLL-DeBELL: Well, let's back up a little bit
21 and start with the fact that Lawson did not know about these
22 patents until this lawsuit was filed, and they say there were
23 articles out there, and the subject of one of the motions *in*
24 *limine*, these articles talked about the patents, but they don't
25 have any proof that anyone at Lawson ever saw those. Lawson

1 did not know about the patents until this lawsuit was filed,
2 and at that time, you know, what they accused of infringement
3 is 8.0.3, and as Mr. Robertson said, they have never said that
4 anything before that infringed, and, in fact, they've said
5 stuff before that does not infringe.

6 So when you're looking at Lawson's state of mind, we
7 are really looking at post-filing of this suit, and at that
8 time, we know that they say 8.0.3 --

9 THE COURT: Now let's stop. So it doesn't have
10 anything to do with willful pre-filing infringement, it's
11 solely confined to willful post-filing infringement; right?
12 That's why you're offering it.

13 MS. STOLL-DeBELL: Right, because you can't willfully
14 infringe a patent we don't know about.

15 THE COURT: That presupposes, don't you realize, that
16 everybody believes that you didn't know about it when there's
17 proof out there that there were publications that you could
18 have known about, and I don't know whether you did or didn't,
19 but I'm trying to define the issue.

20 The issue now is -- and that's all I'm trying to
21 do -- this evidence is admissible for the purpose of showing
22 that you did not willfully infringe post-filing of the lawsuit;
23 right?

24 MS. STOLL-DeBELL: Yes, it is relevant to that, yes.

25 THE COURT: That is the only reason it's relevant,

1 because you said it doesn't have anything to do with
2 pre-filing. On the willful infringement issue, that's the only
3 issue it's relevant to; right?

4 MS. STOLL-DeBELL: Post-filing.

5 THE COURT: Okay. Now, how does it play out
6 post-filing? Tell me about that.

7 MS. STOLL-DeBELL: There is going to be evidence of
8 when they say Lawson started infringing these patents. They
9 have to put it on for their damages case, and we're talking
10 about which version they say infringed and when they say Lawson
11 started infringing.

12 So those are going to be facts that come into the
13 case. So the jury will hear about that, and it will be a fact
14 that these prior versions, anything before 8.0.3, does not
15 infringe. And we will have witnesses --

16 THE COURT: They're not going to prove that. They're
17 not going to offer that evidence -- are you, Mr. Robertson? He
18 said he wasn't.

19 MR. ROBERTSON: No. I'm going to prove that 8.0.3
20 and subsequent versions infringe.

21 THE COURT: But you're not going to say, in doing
22 that, earlier versions they had didn't infringe. That's not
23 going to be part of your case.

24 MR. ROBERTSON: Not going to be part of my case.

25 THE COURT: So now it comes in, you say, to deal with

1 -- when it comes in as part of your case.

2 MS. STOLL-DeBELL: Well, yeah. I mean, at a minimum,
3 it's part of our cross-examination of Dr. Weaver, that he is
4 not asserting that these prior versions infringed, and he is
5 asserting --

6 THE COURT: I'm going to tell you what that's going
7 to come up with. That's going to come up with what you call an
8 objection, and it's going to be sustained most likely. You've
9 got to realize that you've got to try cases in the order that
10 the issues are presented.

11 Now, this is something that you need to raise, so the
12 question is, can you put in evidence probative of your state of
13 mind that when you got the lawsuit, you didn't think you were
14 infringing with the new 8.0.3 because it was just like all the
15 others and they didn't infringe.

16 MS. STOLL-DeBELL: Yes.

17 THE COURT: So you have to then, you say, offer proof
18 that those earlier ones didn't infringe in order to be able to
19 make that argument; right?

20 MS. STOLL-DeBELL: Right, but I think it's all tied
21 in to we don't think any of it infringes because it's all the
22 same thing. So it's -- you know, we don't think any of them
23 had catalogs.

24 THE COURT: What you're doing is thinking without
25 putting it in context of a piece of litigation. You're

1 thinking the thing through as if logic dictated that these
2 things follow one unto the other. That isn't exactly how the
3 trial of the case works. We're looking at whether or not it's
4 probative in your case. All right. Anything else that you
5 wish to say on any of these things?

6 MS. STOLL-DeBELL: I don't think so, Your Honor.

7 THE COURT: Okay.

8 MR. ROBERTSON: One point on that last issue, Your
9 Honor.

10 THE COURT: Yes, since you have the burden on the
11 motion.

12 MR. ROBERTSON: If it's all the same and 8.0.3
13 doesn't infringe, they don't willfully infringe, what's the
14 relevance of 5.0 and 6.0?

15 THE COURT: Because they looked at 5.0 and 6.0 which
16 you didn't accuse of infringing, so they didn't think they were
17 infringing, and they thought you were all wet.

18 MR. ROBERTSON: If it hasn't changed, what they're
19 saying is then it's invalidated because it predates the
20 patents. If they're not infringing now, they're not willfully
21 infringing, it makes the relevance of 5.0 and 6.0 that they
22 didn't infringe even earlier pre-attenuated and marginal in my
23 view. Thank you.

24 THE COURT: This motion is going to be granted. This
25 report goes somewhat considerably off the reservation

1 established by the previous orders of the Court beginning with
2 the requirements that contentions, invalidity contentions be
3 stated at a certain time, and then Lawson was given a second
4 bite at the apple and told to restate them, and those orders
5 were put in place in order that everybody would know how the
6 discovery was to proceed, what were the contentions, what are
7 the contentions, what do we then direct the discovery to.

8 They are not just pro forma requirements of throwing
9 up pieces of paper into the file that contain something about
10 invalidity. They shape -- they are the skeleton of the case to
11 which the flesh and muscles and viscera are attached by
12 discovery, and they mean something.

13 To the extent that Dr. Shamos's report talks about
14 infringement issues -- I mean invalidity issues or infringement
15 issues beyond what was disclosed, that evidence cannot be
16 brought in. It just simply can't.

17 When the validity contentions were filed in the
18 second supplement on the issue of anticipation, it was said
19 there were 14 claims that were infringed -- I mean anticipated.
20 J-Con had one. Gateway was three claims. PO Writer was seven
21 claims anticipated, and 542, King 542 anticipated three.

22 Dr. Shamos says for the first three, J-Con, Gateway,
23 and PO Writer, there were 13 each, and for King 542 there were
24 11, there were 50. He can't testify to anything but to the 14.
25 That's been clear from the beginning.

1 Now, to the extent that Dr. Shamos can offer evidence
2 focused only on those claims and why they anticipate it, he's
3 not bound by the evidence offered at the time of the second
4 supplemental. He can offer, just like Dr. Weaver can offer,
5 additional evidence directed to the same proposition, but that
6 isn't what he did.

7 What he did is, he went out and he concocted a whole
8 new game, and he's not going to be allowed to testify to it,
9 and he can't now go back and find all these references that he
10 constitutes -- that you all say on your side, Lawson, is new
11 evidence in support of the old contention. He's bound to those
12 things that were in his report on which he relied to support
13 the anticipations identified in the 14 claims.

14 I hope that everybody is clear on that, and in that
15 way, Lawson and ePlus are going to be treated the same. But I
16 don't believe the big difference is that Shamos didn't confine
17 himself to the original contentions as did Weaver when he
18 confined himself to the original infringement contentions and
19 then offered more evidence than, in fact, was referred to
20 earlier.

21 That's permissible for him, and it would be for Dr.
22 Shamos had he done that. I don't see that he did it, but if
23 you can show he did it, he did it, but let me tell when you
24 come to trial, when you have him on the witness stand, you
25 better have something to hand up to me to show me exactly how

1 and where and when it -- what he's testifying to relates back
2 to those original claims because he has, I've been able to tell
3 from what I've been given, a propensity to roam and wander, and
4 you better get him back on the reservation, because if he roams
5 and wanders and I have to tell him more than once, he will be
6 roaming and wandering out the back door.

7 And the same is true for Dr. Weaver. They're not
8 going to take over the courtroom and do what they want to do.
9 It's going to be done according to the rules.

10 The same is true for these obviousness combinations,
11 41 brand new ones. They weren't disclosed. Now, if he
12 identified Gateway references originally that were other than
13 the 2000/MRO manual, he can testify about that. If he didn't,
14 he can't.

15 The next issue is whether this evidence of Shamos's
16 that you're fighting over is relevant to the issue of damages.
17 It is said that it's relevant to the issue of non-infringing
18 alternative. I don't believe that that's been established.

19 It is true that the original orders on this point
20 that we were dealing with dealt with invalidity contentions,
21 but you can't get in all these extrinsic information that
22 really relate to points of invalidity under the guise of
23 something else. In other words, you can't dress them up in
24 another dress and send them out into the world. That would be
25 like -- would be like what Jefferson Davis did to lead the

1 confederacy, dressed up like his wife in a dress and headed
2 out. We can't have that.

3 I don't see how any of this evidence bears on the
4 damages issue, nor do I see how the evidence that 6.5 -- six
5 and 5V systems and earlier are substantially the same as the
6 8.0.3 systems that are accused has any probative value as to
7 the willfulness issue, and to the extent that it has value on
8 that issue, i.e., to the extent it's relevant on that issue,
9 the presentation of that evidence would offend Rule 403 because
10 it would cause delay, confusion, and make side trials out of a
11 very difficult case already, and the jury, I expect, I
12 anticipate would be hopelessly confused.

13 With the help of a mind substantially better than my
14 own, for sometime I have been trying to understand what's been
15 going on in this area, and if I can get confused by it, I have
16 every confidence that a jury can. I have to make sure what I'm
17 doing every time that I deal with this issue just to avoid
18 confusion.

19 I don't think it's pertinent to lack of specific
20 intent to induce infringement either or to discredit ePlus's
21 infringement and damages contention for the same reason. To
22 the extent it might be relevant, it's a 403 analysis, and the
23 use of the pre-2002 systems don't do anything but provide
24 confusion, delay.

25 Also, to the extent that Shamos is proffered to

1 testify to something on infringement, he already testified that
2 he didn't study the information on it for infringement
3 purposes. He did it for invalidity purposes, that is the
4 information we're talking about, and so his opinions on that
5 point that are repeated in the infringement issue from the
6 invalidity issue are not either relevant, nor do they fit --
7 nor do they satisfy the fit part of *Daubert*.

8 All right, I think that takes care of all the issues
9 in that motion. Now we have defendant's motion number five.
10 Who is going to do that?

11 MS. STOLL-DeBELL: I am, Your Honor. Just gathering
12 my stuff.

13 THE COURT: You know what? It might be the best
14 thing to do is let Mr. Robertson go first and explain just
15 exactly who is testifying to what so that I get that fixed in
16 my mind. That's this motion, isn't it? Do we have the right
17 one, limit to one expert on infringement and one on invalidity?

18 MS. STOLL-DeBELL: Yes, that's right. I can tell you
19 also.

20 THE COURT: You want to do it? Why don't you go
21 ahead. Since you're planning to do it, you go ahead. Which
22 one of these tabs is it? Five.

23 MS. STOLL-DeBELL: We're looking at slide number 38.
24 Does that help you?

25 THE COURT: Let me get your book first. All right.

1 MS. STOLL-DeBELL: That's the beginning slide. So
2 slide 39 just shows the order that you know already, that the
3 scheduling order of March 15th limited the parties to one
4 expert per discipline. If you look at slide 40 in the book,
5 this is ePlus's Rule 16(b) identification of expert witnesses,
6 and you'll see that they have three technical experts listed
7 with the same discipline: Dr. Alfred Weaver, Brooks Hilliard,
8 and Patrick Niemeyer, and they're all listed as having a field
9 of expertise of computer science and engineering, and then Dr.
10 Weaver and Mr. Hilliard are also listed for application of
11 computer science principles to electronic commerce.

12 Now, they're going to use two infringement experts.
13 They plan to use Dr. Weaver and Mr. Niemeyer to testify on
14 infringement, and they gave us two infringement expert reports,
15 one from each of these men. In their Rule 16(b) identification
16 of experts, which is shown on slide 41, they designate both of
17 them to testify about infringement.

18 Now, I think --

19 THE COURT: Is one of them to testify on source code
20 as well?

21 MS. STOLL-DeBELL: Mr. Niemeyer to testify on source
22 code and both Dr. Weaver and Mr. Niemeyer to testify about
23 infringement. I think in their opposition brief, they say,
24 well, Mr. Niemeyer is not really an infringement expert. He
25 doesn't use the word "infringement" in his report, but that's

1 just not true, Your Honor.

2 He goes through the functionality of Lawson's accused
3 software to prove up their infringement theories. I mean, it
4 is an infringement report, and you can see it right here. I
5 mean, they designated him to testify about infringement, and
6 that's what his expert report is about.

7 You know, I think they also say, well, there's not
8 going to be any overlap, and that's just not true either. Both
9 of these experts are going to get on the stand and talk about
10 the same functionality of Lawson's software. They are both
11 going to talk about item master, what's an item master, how do
12 you search item master, what do you do with the search results,
13 how do you bill a requisition, how do you generate purchase
14 orders, how do you check inventory. It's the same thing.

15 The same is true for validity. If you look at slide
16 42, they intend to use Dr. Weaver and Brooks Hilliard as, as
17 they would say, validity experts, and they gave us two expert
18 reports on validity. Now, they try and divide this up, so they
19 would say Dr. Weaver is going to testify about sections 101 and
20 112, and Mr. Hilliard is going to testify about sections 102
21 and 103 and that there's no overlap there so they ought to be
22 able to subdivide it out that way.

23 I think there's going to be overlap because both of
24 these experts have to talk about what the claims are. We've
25 got 13 asserted claims in this case. They have to go through

1 and talk about the elements. Dr. Weaver is going to do so for
2 section 112. He's going to get up and say, these claims are
3 not indefinite and this is why, this is what they mean.

4 Mr. Hilliard is going to have to do the same thing.
5 He needs to go through element by element and say why the
6 claims are different than the prior art, and so there is
7 inherent duplication in this testimony.

8 You know, I think under their theory, if you can just
9 subdivide out all these issues, we could have 14 experts in
10 this case. If you look at the table I put in, slide 43, you
11 could have one for section 101, let's do section 112 second
12 paragraph, section 112 paragraph six, 102(a).

13 It's just ridiculous, frankly, to divide up the
14 experts this way. It's a waste of time. It's prejudicial to
15 us because we've had to depose all their different experts.
16 It's prejudicial to Lawson because they have three times the
17 amount of technical experts that we do. We have Dr. Shamos.
18 He's our computer science technical expert. He's going to be
19 the guy on the stand for us, and the jury is going to see three
20 different --

21 THE COURT: Who are the other experts?

22 MS. STOLL-DeBELL: Pardon me?

23 THE COURT: Who are your other two experts, and what
24 do they testify about?

25 MS. STOLL-DeBELL: I think we only have one other --

1 THE COURT: I thought you said you had three
2 technical experts.

3 MS. STOLL-DeBELL: No, they do. We have one. We
4 have Dr. Shamos. He's our technical expert, and we have a
5 damages expert. I think that's it unless I'm forgetting
6 somebody. They've got three, three technical experts. We had
7 to depose all of these people, we have to prepare
8 cross-examination for all of them, but I think even more
9 importantly, the jury is going to see three different computer
10 science experts on the stand and, you know, I think --

11 THE COURT: Why didn't you come forward earlier at
12 the time they were proffering these people and move to strike
13 one of the experts?

14 MS. STOLL-DeBELL: I think we have to look at the
15 timing. So they served their Rule 16(b) identification of
16 experts in October of last year. The scheduling order with
17 this limitation wasn't issued until March 15th. We had no idea
18 that they were going to violate this order and offer all these
19 experts until they actually did it.

20 THE COURT: Okay. So they did it.

21 MS. STOLL-DeBELL: In fact, Your Honor, I would point
22 out they had more experts in this Rule 16(b) disclosure than
23 they actually used. They had another technical expert that we
24 didn't get a report on. So there was no way for us to know
25 that they were going to do this.

1 THE COURT: The order wasn't entered, but you all
2 were operating under the order, weren't you? There was some
3 snafu over here in my office, wasn't there, about entering the
4 order?

5 MR. CARR: That's right, Your Honor. It took some
6 time to get the order entered because of the trial date.

7 THE COURT: I think I fouled up something and thought
8 I had entered it and didn't, but anyway, but you all -- I
9 believe when we did enter the order, you all agreed you had
10 been abiding by it, the basic terms.

11 MR. CARR: Mid November or maybe late November,
12 around that time, we had a pretrial conference when we started
13 operating under that, after the Rule 16(b).

14 THE COURT: So my question is, how come you wait
15 until now instead of bringing this motion earlier and saying,
16 look, you're violating the terms -- in fact, I believe the
17 local rule doesn't have that, does it? So how come you didn't?

18 MS. STOLL-DeBELL: First of all, we didn't know they
19 were going to do this until we saw the expert reports, and
20 within a couple of days we sent them a letter saying, what are
21 you doing.

22 THE COURT: And they said what? In response, they
23 said what?

24 MS. STOLL-DeBELL: I think they said that they are
25 different disciplines and they didn't do anything wrong. And

1 then we get the two validity reports, and at that time, you
2 know, we knew this motion *in limine* deadline was coming up, and
3 we filed it at the appropriate time, timely, when the motions
4 *in limine* were due. But, I think another point I wanted to
5 make, Your Honor --

6 THE COURT: So you want them to get the best horse
7 and let it run.

8 MS. STOLL-DeBELL: Yeah, let them pick. They should
9 have one expert for infringement and one for validity. I don't
10 care who they pick, but pick one of them. We shouldn't have to
11 deal with all three.

12 THE COURT: I thought it was four. I guess
13 Niemeyer -- it's Weaver and Niemeyer on infringement and Weaver
14 and Hilliard on invalidity.

15 MS. STOLL-DeBELL: Right. Another point I wanted to
16 make, if you look at slide 44, Dr. Weaver testified in his
17 deposition that we took last week that he was perfectly capable
18 of reviewing source code, but he wasn't asked to do so.

19 THE COURT: You wouldn't object if he looks at the
20 source code and testifies about it then, as long as you get an
21 opportunity to depose him.

22 MS. STOLL-DeBELL: Well, Your Honor, they should have
23 followed the rules. So I would object to that if they do it
24 now.

25 THE COURT: What if you had the choice of Niemeyer or

1 letting him testify about the source code?

2 MS. STOLL-DeBELL: What was my choice?

3 THE COURT: Niemeyer testifying on the source code or
4 letting Weaver go back and testify about it and you depose him.
5 You don't have to decide that right now, but that may be your
6 choice.

7 MS. STOLL-DeBELL: I think they knew what the rules
8 were, Your Honor. They knew that they were limited to one
9 expert per discipline, and they made the decision to split it
10 up this way. And now we're a month away from trial, and to
11 take a deposition of Dr. Weaver again is, frankly, impossible.

12 I mean, it took us months to get it scheduled. We
13 finally just got it done last week. I flew to Charlottesville
14 twice for it because the first time he had a personal issue and
15 had to cancel it after we had already got there. I had an
16 employee of Lawson that went with me. We made two trips. We
17 had to split it over two days.

18 So I don't see that deposing Dr. Weaver again is a
19 viable option at all, particularly when we have all of the
20 other things that we need to do to get ready for trial in this
21 case. We've got our exhibit lists coming up, we've got the
22 pretrial conference in this. It's just not fair to Lawson to
23 put us in that position at this point when we didn't do
24 anything wrong. We have one expert.

25 THE COURT: Okay.

1 MS. STOLL-DeBELL: My other point is Dr. Weaver could
2 have looked at the prior art. He testified about that. He was
3 perfectly capable of looking at the prior art in this case. He
4 wasn't asked to do so, and you'll see that testimony on slide
5 45.

6 And, in fact, in the Ariba case, it's my
7 understanding that Dr. Weaver did, in fact, look at the prior
8 art and testify about validity under sections 102 and 103. So
9 I don't understand why they felt like they could divide it into
10 three experts when the order is very clear. It's one expert
11 per discipline.

12 You know, I think they have a couple of excuses or
13 reasons why they think this motion should be denied. The first
14 is they say there's no overlap, but I already talked about
15 that. There is substantial overlap between all of these
16 experts. They talk about the SAP case, and they split
17 responsibilities among their experts in that case like they're
18 trying to do here.

19 THE COURT: Before the expert reports were prepared,
20 were submitted, you called them out on this issue; is that what
21 you did?

22 MS. STOLL-DeBELL: I don't think so, no, Your Honor.
23 I think we sent them a letter a couple days after we received
24 their two infringement reports.

25 THE COURT: You called them out then, and they could

1 have said, oh, my goodness, we're going to have to restructure,
2 and at that time you could have deposed the experts over again
3 and let them do some supplemental reports if they'd been caught
4 with their foot on the base, and they could come to the Court
5 and said, we fouled up.

6 MS. STOLL-DeBELL: Yeah, possibly, and certainly we
7 gave them plenty of notice before the validity reports were
8 due. So at a minimum, they could have come up with one
9 validity report, but they didn't. They said, we didn't do
10 anything wrong, and, yeah, and made the choice to violate that
11 order again, two validity experts, and to not try and work it
12 out and fix it with respect to the infringement experts.

13 You know, I already talked about their parade of
14 experts. It will be prejudicial to Lawson. I think the jury
15 can only conclude that they've got three computer scientists up
16 there saying they're right, and we only have one saying we're
17 right. It's not fair. It seems to me that's one of the
18 reasons the Court has the rule in the first place, not to
19 mention the waste of time.

20 This case is already immensely complicated. I don't
21 see how there's any way we're going to get it tried in two
22 weeks with 13 claims, and if we have three experts testifying
23 about the same thing, it makes it that much worse. So for that
24 reason, we ask they be limited to one expert for infringement
25 and one for validity.

1 THE COURT: All right. Thank you.

2 MR. ROBERTSON: Thank you, Your Honor. Let me
3 represent we certainly had no intent to circumvent the
4 scheduling order in section four, and we were very surprised
5 when we received a letter after they received the infringement
6 report from Dr. Weaver and a source code report from Mr.
7 Niemeyer.

8 They do not overlap in any way, and they're directed
9 to each of their disciplines. Scheduling order says that it is
10 expressly directed to discipline, Your Honor. We understood
11 that to be consistent with Rule 403 which talks about
12 introducing cumulative evidence.

13 I want to show Your Honor today, and they have never
14 come forward once and showed that there was any particular
15 paragraph from any particular expert report that overlaps. In
16 other words, Your Honor, we don't have a situation --

17 THE COURT: That's not the issue. The issue is
18 whether they're the same discipline, and the other thing is
19 when you have some apprehension, you come to the Court and
20 raise it. You could have done it in a telephone conference,
21 and then after they told you that you had your foot off base,
22 you went ahead blindly instead of coming to the Court and
23 saying what happened at a time when we could have done
24 something about it. We could have said to them, well, you can
25 have another expert.

1 MR. ROBERTSON: We did say to them --

2 THE COURT: You didn't come to the Court.

3 MR. ROBERTSON: Because we didn't believe, and we
4 still don't believe, we did anything wrong under the scheduling
5 order. What we said to them at the time was, there's no
6 overlap, these are not separate disciplines, and they said to
7 us in response, okay, we'll table the issue for now, we'll go
8 and take their depositions, and they did go and take their
9 deposition.

10 I'll just give you an example. In the Niemeyer
11 report, for example, Your Honor, there's not one instance where
12 Mr. Niemeyer says anything about infringement or the claims or
13 anything. What he says is, I was retained because I'm an
14 expert in Java code. In fact, he wrote books, well-received
15 books on interpreting Java codes. It took hundreds of hours
16 for him to review the source code. He had to make seven trips
17 to Washington, D.C. because we had to keep the source code in a
18 secure room, and he spent 350 hours and ten of thousands of
19 dollars pouring over the source code only to be able to say
20 this is what the source code shows me its functionality is.

21 Now, Dr. Weaver can rely on Mr. Niemeyer's report to
22 say, yes. In addition to all this other evidence I have that
23 I've disclosed in my infringement contentions and my expert
24 reports, relying on demonstrations of the systems, relying on
25 manuals, relying on other evidence that shows the features and

1 functionality of Lawson Software, that it's also confirmed by
2 Mr. Niemeyer, who is an expert in source code review, that that
3 software also had that functionality, but Niemeyer never once
4 went into the territory where he discussed the claims or he
5 discussed the infringement. He never makes any such
6 conclusions. If I might just have the slides.

7 THE COURT: He's going to testify, are both of them
8 going to testify about functionality?

9 MR. ROBERTSON: No. Mr. Niemeyer is only going to
10 testify about what the source code says. In fact, I might not
11 even need to call Mr. Niemeyer because Dr. Weaver can rely on
12 his exhibit report and did so when he generated --

13 THE COURT REPORTER: Mr. Robertson.

14 MR. ROBERTSON: Sorry.

15 THE COURT REPORTER: I can't keep up.

16 MR. ROBERTSON: I apologize. Dr. Weaver relied on
17 Mr. Niemeyer's report when he did his expert report to confirm
18 that his conclusions were, indeed, correct in that the source
19 code was an additional piece of evidence that showed that the
20 Lawson software does everything that its manual say it does,
21 their representations to their customers, the testimony we got
22 from their witnesses, and the demonstration systems that we're
23 going to put on to the jury to show what indeed happened.

24 If I could go to the next slide. So this is in our
25 response to defendant's number five. Let's go to the next one.

1 We went back and we looked at this even at the time, Your
2 Honor. We said, you know, the report is directed to a
3 discipline. Slide number 18. So we said, what is a
4 discipline? It's a branch of knowledge or teaching. It's a
5 subject that's taught, a field of study. This is consistent.
6 We go to the next one.

7 So here's their fields of study. It was represented
8 that they're all computer scientists. They're not all computer
9 scientists.

10 THE COURT: She said you said this. She said that
11 you were asked to give their qualifications, and this is your
12 material, she says, on her slide 40.

13 MR. ROBERTSON: This is not their field of study.
14 This is what is represented as saying these are areas in which
15 they may testify. This was back in October 1 of 2009. They
16 ultimately did not testify as to all these things. This was
17 very early on.

18 If you look at the next slide, 41, they said they may
19 be proffered on these issues. Ultimately, they weren't
20 proffered on many of these issues. When you look at the field
21 of discipline and you look at these experts' field of studies,
22 Dr. Weaver is a computer scientist.

23 Mr. Hilliard, who has experience in computer science
24 but doesn't have a degree in computer science, is a consultant
25 with almost 30 years of experience in the kind of information

1 technology field, procuring systems, internet-based
2 e-procurement systems, and other business systems with
3 procurement functionality. And Mr. Niemeyer is this Java code
4 expert who confined himself only to interpreting the source
5 code.

6 Why are these particular disciplines, these fields of
7 study relevant to the issues on which we've offered their
8 testimony? That's because they don't overlap in issues. The
9 defendant wants to conflate the Court's ordered discipline with
10 legal issues. I don't think that follows. I think it really
11 is field of study. At least that's how we understood it, and
12 we've confined their --

13 THE COURT: I may have made a mistake in the way I
14 wrote that order, but you're about as far off base as you can
15 get. My question is, how do I remedy the situation for them.

16 MR. ROBERTSON: There is absolutely no overlap, and
17 we've had no inefficiencies in presenting this evidence. The
18 representations that were made about how this is going to be
19 inefficient just haven't borne out in reality when we put this
20 case on. I mean, anybody is going to have to go through the
21 claims with respect to how the functionality and features --

22 THE COURT: Who is going to do that for you?

23 MR. ROBERTSON: Dr. Weaver, nobody else. An expert
24 is going to have to go through the claims --

25 THE COURT: Niemeyer is not going to mention any of

1 the claims at all?

2 MR. ROBERTSON: Not a one, zero. He's going to talk
3 about what his review of the source code revealed if, in fact,
4 he even needs to testify, and I think I might make the decision
5 that he doesn't need to testify simply because Dr. Weaver can
6 rely on that under Rule 702.

7 Dr. Hilliard testified in the SAP trial, he's --
8 excuse me, Mr. Hilliard. He's been familiar with a lot of this
9 prior art that they've been offering now. He's been working
10 with it on the re-exams, he's offered --

11 THE COURT: What is Weaver testifying to on
12 invalidity?

13 MR. ROBERTSON: There are certain -- there's almost
14 every defense in this case, Your Honor. There's a 101
15 patentability defense, there's a 102 anticipation as you are
16 aware. There's a 103 prior art defense. There's 112
17 written --

18 THE COURT: Patentability, isn't that a question of
19 law?

20 MR. ROBERTSON: Excuse me?

21 THE COURT: Isn't that a question of law?

22 MR. ROBERTSON: Which question?

23 THE COURT: Patentability. And didn't I just decide
24 it?

25 MR. ROBERTSON: It's unclear, Your Honor, from your

1 report. Is it a question of law, because I thought you had
2 indicated it might be some factual issues. I viewed it as a
3 question of law that was either up or down, that is the claims
4 are either patentable subject matter or not, and that the Court
5 had ruled that -- I thought I understood the Court to rule that
6 they were, and, therefore, it was out of the --

7 THE COURT: You didn't come forward and ask for a
8 determination it was patentable. You just opposed their motion
9 for summary judgment. That's all you did, so you can't get
10 what you want that way. That's the problem that you've created
11 when you approached it that way. That's okay, but that's where
12 we are.

13 MR. ROBERTSON: I suppose I should have cross moved,
14 Your Honor, but I had indicated to Your Honor I wasn't going to
15 move for summary judgment, and, quite frankly, the claims were
16 claims --

17 THE COURT: What is Weaver going --

18 MR. ROBERTSON: If you look at slide number 21 on the
19 invalidity defenses, if the Court permits, and I can understand
20 if the Court views it as purely a legal issue, expert testimony
21 may not be necessary, but let me just suggest, Your Honor,
22 expert testimony is often offered on the issue of claim
23 construction and was, in fact, offered in this case, and that
24 is a purely legal issue.

25 So, in the context of this *Bilski* Section 101

1 argument, you may recall, Your Honor, from the briefing, the
2 Supreme Court didn't give us much guidance, but it did say the
3 machine or transformation test is a clue to whether it's
4 patentable subject matter.

5 I would think it could be some assistance to the
6 Court if a computer scientist could actually tell the Court how
7 the subject matter of those claims is tied to a machine or
8 transformation of matter. So that would be the only place I
9 would you suggest --

10 THE COURT: The jury would decide is it tied to a
11 transformation once it is --

12 MR. ROBERTSON: I don't think that's a fact question
13 that the jury could decide. In fact, as Your Honor mentioned
14 this morning, you wouldn't have two experts take the witness
15 stand, testify as to claim interpretation, and then put the
16 claim interpretation to the jury. That would be a purely legal
17 issue for the Court to determine.

18 I think like claim construction, like the
19 construction of a contract, Section 101 of the patent statute
20 would be an issue that the Court should decide. It might want
21 to hear testimony on it, it might not. We did offer a
22 declaration of Dr. Weaver indicating that it was patentable
23 subject matter under the Supreme Court's recently articulated
24 reiteration of the Federal Circuit's machine or transformation
25 test.

1 Dr. Weaver is not going to talk about the 102 prior
2 art because Mr. Hilliard has studied all these prior art
3 references going back to the SAP case involved in the re-exams.
4 Dr. Weaver is not going to talk about the 103 because Mr.
5 Hilliard is an expert on that. Why is that? Because they are
6 relying largely on these public uses and printed publications,
7 all associated with these systems they claim existed out there.

8 As a person who has 30 years experience in the
9 electronic procurement field, he has studied all those and is
10 very efficient at putting on that testimony. Now, as to these
11 112 issues, they all relate to the specification, as Your Honor
12 knows. We had the written description argument this morning.
13 We had the enablement -- putting forward an enablement defense
14 and this indefiniteness defense.

15 All those have to do with what the patent teaches to
16 one of ordinary skill in the art or what it doesn't. Dr.
17 Weaver, as a computer scientist, because the Court is aware
18 that these are heavily technical issues, is the person best
19 suited under his discipline to address those issues.

20 Now, I would make one observation, Your Honor. This
21 was known to Lawson's counsel long ago, because Dr. Weaver and
22 Mr. Hilliard both testified in the SAP case, and we produced
23 all of their testimony and all of their depositions, so it came
24 to us as a little bit of a surprise, particularly when we were
25 viewing them as separate disciplines, that suddenly there was

1 some sort of issue with this, but we certainly don't intend to
2 have anybody saying, I agree with Dr. Weaver, or Mr. Niemeyer
3 is going to testify about the claims. It's not going to
4 happen.

5 In fact, the way this infringement case typically
6 comes in, Your Honor, is we spend about a day, maybe a day and
7 a half, showing the jury the features and functionality of the
8 accused Lawson Software. And we do that, as I said, through
9 these demos. Just watch us do these searches and come back
10 with these results and build requisitions, generate the
11 purchase orders. Takes about a day, day and a half. Dr.
12 Weaver, using the evidence -- and I know you've seen Dr.
13 Weaver's report, and it looks a little intimidating, but we
14 counted out and there's only --

15 THE COURT REPORTER: Mr. Robertson --

16 MR. ROBERTSON: Sorry. There's only --

17 THE COURT REPORTER: Judge, I can't keep up with him.

18 MR. ROBERTSON: I apologize.

19 THE COURT: Okay, if you don't do something to
20 moderate what's going on, you're going to have to let somebody
21 else talk because I don't have but one court reporter in here
22 at a time, and she's been here a long time anyway. She's asked
23 you several times, and have I, so you have to slow down.

24 MR. ROBERTSON: Yes, sir. I lost my train of
25 thought. We put on the evidence with the features and

1 functionality, and then Dr. Weaver, in about an hour, hour and
2 a half, can walk through the claims and show, Dr. Weaver, do we
3 see where they can search multiple catalogs; yes. Do we see
4 where they can build the requisition and the purchase orders.
5 He goes through all that, and we're done with the infringement
6 case.

7 With Hilliard, he's actually responding in rebuttal
8 to the case that they're going to put on. Now, Mr. Hilliard
9 can get up and show what features and functionality in the
10 alleged prior art or the alleged prior art systems is not
11 available. He doesn't have to go through every single claim.

12 Your Honor may recall that we've had some issues with
13 Dr. Weaver's health, and, in fact, the deposition was canceled
14 that Ms. Stoll-DeBell had to go down there because the day
15 before, the afternoon of, Dr. Weaver's 86-year-old mother
16 slipped and fell, broke her pelvis and ribs, and he had to go
17 to the hospital. I immediately called them, and I volunteered
18 to pay their expenses for that trip, but that was unavoidable.

19 Now, Dr. Weaver was not in a position to come to
20 Washington, D.C., for 350 hours, seven times during the
21 academic -- with the academic career he has, and as I say,
22 well, the argument is made he could read source code. It
23 certainly isn't something he makes a practice out of doing, and
24 he certainly didn't have the time given his medical condition.

25 That's just a reality we were working with, but I'm

1 not going to have any me-too experts. I'm not going to have
2 any overlap. I'm not going to have any situation where someone
3 has to go through a claim analysis all over again.

4 We didn't understand discipline to mean legal issue.
5 The legal issues are separate and distinct and apply themselves
6 to a particular expertise or experience, either a computer
7 scientist or somebody who actually has experience in this
8 field. Now, of course, if we were --

9 THE COURT: How are you defining field?

10 MR. ROBERTSON: Well, in the case of Dr. Weaver, he
11 is a Ph.D. with computer science technology background. Mr.
12 Hilliard is this electronic procurement expert, and Mr.
13 Niemeyer is an expert in reading source code. He is -- and
14 it's not --

15 THE COURT: That isn't what you said under Rule 16,
16 though, your identification.

17 MR. ROBERTSON: You know, we were perhaps a little
18 bit too broad in there, but we did identify them and provide
19 their CVs, and, you know, in addition -- so I think they could
20 have seen all their credentials as to what they had. It was
21 very early on in the case, Your Honor. Subsequently --

22 THE COURT: You think that that's a good argument for
23 you when you are attacking them on other things that happened
24 early on in the case? I mean, these invalidity contentions are
25 early on in the case. If that's the rule we're going to

1 follow, I better revise my ruling as to them. Come on.

2 MR. ROBERTSON: But, it's -- the point about --

3 THE COURT: You've tried this case twice, and you
4 know exactly what you're doing with it. You could have put
5 these experts in along with your complaint almost. Come on.

6 MR. ROBERTSON: We identified them early on. We
7 identified them in our initial disclosures. We provided all
8 their testimony from the prior cases, Your Honor. I mean, this
9 is not something that came as a surprise to them. I'm
10 surprised to hear that later on they were surprised.

11 The fact is, the scheduling order is addressed to,
12 what I understand, Your Honor, the efficiencies at trial in not
13 presenting cumulative evidence, and we have no intention of
14 doing that. We're going to be as efficient as we can with
15 absolutely no overlap, and I understand the Court is going to
16 hold me to that, and I want the Court to hold me to that, and I
17 can put this case on very efficiently with these experts if I
18 even need to call Mr. Niemeyer.

19 THE COURT: Okay.

20 MR. ROBERTSON: But if I am not permitted to call
21 them -- if I can go back to that last slide -- I may not have
22 anybody to rebut Mr. Shamos on written description, enablement,
23 or indefiniteness because Mr. Hilliard --

24 THE COURT: Good. Rule 50 will kick right in. We
25 can shorten things.

1 MR. ROBERTSON: I would suggest, Judge, that that
2 would just be a manifest injustice to not permit us, when the
3 scheduling order did not make clear that it was per legal
4 issue, and we had, we understood --

5 THE COURT: It still isn't per legal issue.

6 MR. ROBERTSON: I'm sorry?

7 THE COURT: It's still not per legal issue. You're
8 the one who has divided it into legal issue.

9 MR. ROBERTSON: No, sir.

10 THE COURT: Yeah, right here. 101 subject matter,
11 Weaver. 102 prior art, Hilliard. That's your structure. The
12 Court didn't do that. She didn't do it either. That's the way
13 you've chosen to deal with it.

14 MR. ROBERTSON: I respectfully disagree, Your Honor.
15 What they characterize the disciplines mean is invalidity and
16 infringement, and we need one invalidity expert and one
17 infringement expert. So they equate discipline with the legal
18 issue. We didn't. We equated it with a particular field of
19 study that a witness --

20 THE COURT: Field of study, subject matter; field of
21 study, prior art; field of study, written description; field of
22 study, enablement; field of study, indefiniteness. Is that the
23 field you're talking about?

24 MR. ROBERTSON: No. I think those are sub legal
25 issues, but what I'm talking about is field of study, I'm a

1 computer scientist who can address the issues that are relevant
2 to a written description because I need to look at the
3 specification and find the support as we were arguing this
4 morning. Field of study, I'm an e-procurement expert, I can
5 look at these systems and tell you that they don't have the
6 functionality of the patents, and field of study, I'm a source
7 code expert, I can read their source code and tell you what it
8 says.

9 THE COURT: All right. Thank you.

10 MS. STOLL-DeBELL: I think just a couple of very
11 brief responses to that, Your Honor.

12 THE COURT: Do you need any time? Do you want to
13 designate another expert and want a continuance?

14 MS. STOLL-DeBELL: I don't know. I would have to --
15 we'd have to think about that. You know, we've put a lot of
16 time in getting ready for trial, and so I'm not sure I can
17 answer that question right now. It would certainly mean
18 substantially more costs for our client if trial is delayed,
19 and so that's something that we need to think about.

20 You know, I think our requested relief would be to
21 hold ePlus to the rule in the scheduling order that they knew
22 about. Mr. Robertson keeps talking about the *SAP* case, but
23 there wasn't that rule in the *SAP* case. My understanding is
24 they had Dr. Weaver as the infringement expert and Mr. Hilliard
25 as the validity expert in that case. Now, obviously we weren't

1 part of it. I wasn't there.

2 THE COURT: You read the deposition and the
3 testimony, didn't you? Is that what he testified to?

4 MS. STOLL-DeBELL: That's my understanding, Your
5 Honor. As far as Dr. Weaver and his health issues, he
6 testified during his deposition last week that he's had back
7 problems for years and that ePlus knew about his back problems
8 when they hired him as their expert in this case.

9 THE COURT: What does this have anything to do with?

10 MS. STOLL-DeBELL: I think they're saying he couldn't
11 review the source code because he has health issues, and my
12 response to that is --

13 THE COURT: I thought they said he couldn't go up
14 there and go through the source code because of his teaching
15 responsibilities. They didn't say he couldn't review it
16 because of his back issues. Maybe I misunderstood.

17 MS. STOLL-DeBELL: Maybe I misunderstood.

18 THE COURT: Mr. Robertson, were you saying he
19 couldn't go review the source code because of his teaching
20 responsibilities or because of his back? Which one of us is
21 right?

22 MR. ROBERTSON: Well, I spoke to the teaching
23 obligations, Your Honor, but, you know, to be perfectly candid,
24 seven trips back and forth from Charlottesville to D.C. would
25 have been very taxing on Dr. Weaver, and it was a factor --

1 THE COURT: It's taxing on anybody.

2 MR. ROBERTSON: I wouldn't hide the fact that it was
3 a consideration in my mind when Mr. Niemeyer, an expert in
4 source code review, became available and was identified early
5 in the case.

6 MS. STOLL-DeBELL: Your Honor, I think the bottom
7 line here for us, Your Honor, in their own words, they said,
8 all three of these gentlemen have a field of expertise of
9 computer science and engineering, and, you know, that is how I
10 interpret discipline.

11 Now, we have only asked that they be limited to one
12 expert for infringement and one for validity. That's what we
13 asked for in our motion.

14 THE COURT: But the experts who have testified
15 haven't testified that way or haven't reported that way, have
16 they?

17 MS. STOLL-DeBELL: I'm sorry, I don't understand the
18 question.

19 THE COURT: They haven't made their reports in that
20 fashion as you are suggesting, so he says he'd be left off
21 base. Let me try it another way. Mr. Robertson says that
22 because of the situation he would be left without anybody to
23 meet the testimony of Dr. Shamos on issues and perhaps -- and
24 isn't that what he said?

25 MS. STOLL-DeBELL: Well, I mean, they knew what the

1 rule was, and they divided their expert reports up. We
2 objected --

3 THE COURT: I know that. I got that. What we have
4 here is what does that word in the order mean, I suppose, and
5 how the parties have dealt with the issues surrounding it and
6 what's the consequence to them and to you of granting the
7 relief or denying it respectively. That's what I'm trying to
8 sort out.

9 MS. STOLL-DeBELL: So, I think, you know, he's
10 already said he may not call Mr. Niemeyer. So I assume if you
11 order them to choose one expert for infringement and one for
12 validity, I assume they'll choose Dr. Weaver for infringement,
13 and they'll put him on the stand and he'll give the opinion he
14 disclosed in his report. As for validity, they are going --

15 THE COURT: Did Hilliard give validity opinions that
16 are at issue in the case?

17 MS. STOLL-DeBELL: Pardon me?

18 THE COURT: Did he give validity opinions on the
19 issues in the case?

20 MS. STOLL-DeBELL: Mr. Hilliard?

21 THE COURT: Yes.

22 MS. STOLL-DeBELL: Yeah, he did on Sections 102 and
23 103.

24 THE COURT: Would you look at 21, his slide 21. He
25 says, if Weaver can't testify on invalidity, he doesn't have

1 anybody on 101 -- 112, description, enablement, and
2 indefiniteness, because Hilliard didn't opine on those issues.
3 Is that a correct assertion, in your view?

4 MS. STOLL-DeBELL: Yes, I think it is.

5 THE COURT: So in essence what you are asking me to
6 do is to grant judgment for you because they had their foot off
7 base, i.e., they're going to be at the point where they don't
8 have any testimony, and a Rule 50 motion would have to be
9 granted at the end of the case, and we'd be going through all
10 this for nothing insofar as they're concerned, and so I think I
11 understand. Is there anything else that you've got to argue?

12 MS. STOLL-DeBELL: No, I don't think so.

13 THE COURT: You've made quite a good argument, and
14 it's a forceful one and a right one, but in many respects, I
15 think the Court has got to be mindful of the fact that perhaps
16 it played a role in this situation as well, and when that
17 happens, the Court has to be somewhat more understanding than
18 when the parties are on their own, do something that is
19 prohibited by an order. So that's kind of what's on my mind,
20 and if you want to address any of that, you can.

21 MS. STOLL-DeBELL: I just think Lawson didn't do
22 anything wrong here for this particular issue.

23 THE COURT: You didn't, and I don't think he's argued
24 for one minute that you did anything wrong with respect to what
25 you designated and how you interpreted things. He did say you

1 should have raised it earlier with me and with them, and
2 perhaps there's some truth to that.

3 MS. STOLL-DeBELL: So my response to that is, Lawson
4 should not have to suffer for this, and we will suffer unless
5 you grant our motion. If we have to do a continuance and look
6 at hiring another expert, that's substantially more cost in a
7 case that has cost already a lot of time and money, frankly,
8 Your Honor.

9 THE COURT: I'm well aware of that one.

10 MS. STOLL-DeBELL: So, you know, and allowing them to
11 just get by with violating this rule and put on two experts is
12 not fair to Lawson either. It's very prejudicial.

13 THE COURT: I understand your point.

14 MS. STOLL-DeBELL: I would ask that you keep those
15 things in your mind, Your Honor.

16 THE COURT: I've had them in my mind as I've been
17 reading these things. I understand where you are and what the
18 situation is. It's clear from the papers. I probably could
19 have decided this without argument, but I felt like it was only
20 fair to hear. Okay, thank you.

21 Well, the scheduling order says only one expert per
22 discipline is permitted except by order of the Court. In
23 February, or in March, I guess it was -- when was it you made
24 your disclosures, 16(b) that you rely on?

25 MS. STOLL-DeBELL: October.

1 THE COURT: October, yes. October ePlus identifies
2 its experts, describes their fields of expertise, and there's
3 significant overlap in them, very significant overlap. And
4 then there is identified what the true state of affairs is when
5 the expert reports are filed. And as it turns out, Mr. Weaver
6 is addressing both infringement and invalidity, and Mr.
7 Niemeyer is addressing a basic subject related to the issue of
8 infringement that is needed by Mr. Weaver in order to formulate
9 his opinions. Mr. Hilliard is addressing just two components
10 of the aspect of invalidity.

11 Right after that occurred -- when were those reports
12 filed, the infringement report?

13 MS. STOLL-DeBELL: I believe it was May 5th.

14 THE COURT: Within a couple of days after that, the
15 defendants complained of the problem to ePlus, and ePlus --
16 neither ePlus nor the defendants then came to the Court and
17 raised it at a point in time when something could have been
18 done about it.

19 Something can be done about it now, and then mindful
20 of the scheduling for motions *in limine*, ePlus thought the best
21 way to deal with it, after they got Lawson's response, was to
22 file a motion *in limine* promptly which they did and acted
23 properly in doing that.

24 The problem that I see here is that the Court has a
25 role in not clarifying what "one per discipline" means, and it

1 is not right for the parties to be saddled with the
2 consequences of the Court's failure to be precise in its
3 orders.

4 Mr. Robertson is correct that the purpose of that
5 provision is to avoid redundant, cumulative expert testimony
6 and the situation that is presented when you have three experts
7 testifying essentially to the same thing and you're trying
8 to -- and one side is forced then to try to meet the number of
9 experts that the other side puts on.

10 That was the intent of the provision, and it's the
11 way it's been applied over the years. So I can't say ePlus's
12 interpretation of the word "discipline" is wrong in perspective
13 of its representations that there will be no overlapping
14 testimony. I can't say either that the testimony -- that the
15 interpretation of Lawson was wrong in respect of its
16 interpretation of the matter.

17 Under the circumstances, it's important to remember
18 that under Rule 1 of the Federal Rules, it is the purpose of
19 all the rules, federal and local, to achieve a prompt or a
20 speedy, just, and efficient resolution of cases. So this rule,
21 this order has to be interpreted in respect of the basic
22 concepts of fairness and justice as well.

23 Doing that in this case under the circumstances of
24 this case, so long as there isn't any overlapping testimony,
25 justice can best be served by denying this motion and allowing

1 ePlus leave to have either -- I mean Lawson, excuse me, it's
2 been a long day -- to have time to have another expert if it so
3 desires if it feels like it's disadvantaged in the area of
4 source code. I think that -- I'm sure that your own people,
5 you can probably do that in-house, but if you need to go
6 outside, you can go outside, and you can meet Mr. Hilliard's
7 testimony with another expert if you so desire.

8 I think that in that way -- I regret the Court's
9 failure to define the matter more precisely, and I regret that
10 you all didn't bring this to me when it first came up, because
11 I would have solved it by extending your time for getting
12 experts and giving you some extra leeway had it been brought to
13 me, but I don't think that the result that should obtain here,
14 notwithstanding that you all didn't come to the Court as early
15 as you should have, is to prejudice the outcome of the case by
16 striking experts which will, in effect, mean that one party or
17 the other is left without evidence on a topic thereby
18 resulting, or almost assuredly resulting, in a Rule 50(b)
19 motion that will be based on something that's artificial and
20 not in the interest or the spirit of the enforcement of the
21 rules, nor do I think it's fair to keep Lawson tied to where it
22 is right now.

23 It doesn't have to have any other experts. I need
24 for you to fish or cut bait very quickly, but you have every
25 right to talk to your client and caucus among yourselves, and I

1 didn't really mean to put you in the position that you had to
2 answer right today, but you handled it correctly by saying you
3 had to go talk to somebody, and you're absolutely right. You
4 had to.

5 So that will be the ruling in this motion. How much
6 more do we have in the way of motions? How many, Mr. --

7 MR. McDONALD: I think we have two left, Your Honor,
8 one on the demonstration system and the other on the third
9 party, the South Jersey customer's deposition, and two
10 demonstrations.

11 THE COURT: I think we ought to take a little break.
12 I'll tell you, I'm worried Ms. Peterson is going on strike here
13 anyway, so we'll take about a 15-minute recess, and then we'll
14 try to finish these up this afternoon.

15

16 (Recess taken.)

17

18 THE COURT: Which goes first, ePlus's four or
19 Lawson's nine? Excuse me, Mr. Robertson.

20 MR. ROBERTSON: Sorry, Judge.

21 THE COURT: Which goes first, ePlus's four or
22 Lawson's nine? They both are demonstrations sort of generally.

23 MS. ALBERT: I'll address ePlus number four first if
24 the other side doesn't --

25 THE COURT: Is that okay with you?

1 MR. McDONALD: That's fine.

2 MS. ALBERT: So, Your Honor, ePlus's motion *in limine*
3 number four addresses these Lawson re-created legacy system
4 demonstrations that are purported to be demonstrations of
5 Lawson system version five and six. As an overview, on our
6 slide 14, the defendant has conceded that the alleged Lawson
7 legacy systems postdate the prior art date of the patents in
8 suit.

9 Much of the relevant source code for these systems
10 was created after August 1994 as demonstrated by the
11 defendant's own documents. Virtually all of the hardware,
12 middle ware, and operating system software that was used for
13 these demonstration systems postdates 1994.

14 The witness who --

15 THE COURT: You all talk about the legacy system.
16 What are you talking about? Is it V6 and V5?

17 MS. ALBERT: Correct, Your Honor. They are
18 represented by Lawson to be version five and version six
19 systems, but it is ePlus's contention that these are not
20 accurate depictions of the Lawson version five and version six
21 systems, because much of the relevant source code for these
22 systems was actually created after the fact. They postdate --

23 THE COURT: After the fact of what?

24 MS. ALBERT: After these systems were represented to
25 have been commercially available. They are also after the

1 prior art date of the patents in suit, August 10th of 1994, so
2 they are not relevant to show any prior art system. And the
3 hardware, middle ware, and operating system software that was
4 used in these re-created demonstrations, virtually all of that
5 postdates 1994.

6 The witness who proffered the systems could not
7 authenticate that the systems were what they are purported to
8 be by Lawson, so under Rule 901, they should be excluded on
9 that basis. And it's ePlus's position that any demonstration
10 of systems would be highly prejudicial because they would be
11 likely to mislead the jury to think that these are actual
12 Lawson version 5.0 and version 6.0 systems when they are not.

13 THE COURT: Why does 5.0 and 6.0 come into the case
14 at all anyway?

15 MS. ALBERT: Well, I think under Your Honor's orders
16 on the various motions *in limine*, now the admissibility of
17 evidence related to these systems is limited to that one
18 element of the one claim that relates to the means for
19 searching for matching items in the database. I think that's
20 claim three of the '683 patent, and that's the only issue for
21 which --

22 THE COURT: How does this relate to the -- that's an
23 infringement issue, isn't it?

24 MS. ALBERT: I think it was related to a validity
25 issue in that Dr. Shamos dealt with that issue in his

1 invalidity report, and I think --

2 THE COURT: Fill me in on that. Because this system
3 is for prior art; is that what that is?

4 MS. ALBERT: Well, I believe that they would intend
5 to put this demonstration on at trial in order to establish
6 that the Lawson version 5.0 and version 6.0 systems could
7 perform that element of that claim.

8 THE COURT: So that's an invalidity issue, because
9 it's prior art; is that what the point is?

10 MS. ALBERT: That's what Lawson's contention is, the
11 version 5.0 and version 6.0 systems are prior art systems, but
12 these demonstration systems are not prior art systems. They
13 don't predate the date of the patents because the source code
14 that was used for the systems actually postdates August of '94,
15 and the hardware, the middle ware, and the operating system
16 software postdates 1994. Can you turn to the next slide,
17 please.

18 Slide 15 illustrates some of the source code file
19 directories that were produced by Lawson relating to the source
20 code that was compiled in order to generate these demonstration
21 systems. We've highlighted just an excerpt of these -- it was
22 about a hundred-page document of the source code file listings
23 just to show that, you know, Lawson acknowledges that many of
24 the source code files that are included in the source code that
25 was used for these re-created demonstration systems actually

1 postdates August 10th of '94. So it's not a relevant prior art
2 system because it's not prior art.

3 Can you turn to the next slide, please. As to the
4 re-created -- what's purported to be a Lawson version 6.0
5 system, once again, the source code file directories that were
6 produced by Lawson illustrate that much of the relevant
7 portions of the source code that was compiled to re-create the
8 system actually postdate August 10th of 1994.

9 So this, again, is not a prior art system, and it
10 shouldn't come into evidence to confuse the jury that this
11 accurately depicts a system that is prior to the date of the
12 patents.

13 The next slide, slide 17, shows the various hardware,
14 operating systems, and middle ware that was used by Lawson in
15 these re-created demonstration systems, and as you can see on
16 this table, virtually all of this postdates August 10th, 1994.
17 And why is that relevant? Well, contrary to Lawson's
18 contentions that what they did with their demonstration system
19 is akin to showing an old movie on a new projector, that's not
20 the case. Much of the operating system actually affects the
21 functionality of the system. The user interface that was used
22 that dated from 2009 actually creates differences in the
23 usability of the system, creates differences in the look and
24 feel of the system.

25 The terminal emulation software that was used in

1 order to replicate what would have been a system that you would
2 have operated at a terminal that would have communicated to a
3 mainframe system. What Lawson used for that, once again, was
4 something that postdated August 10th, 1994, and adds an
5 entirely new process into a terminal-to-database translation
6 process that would never have existed in 1994 in order to
7 access data in the database.

8 Turn to the next slide, please. Lawson's 30(b)(6)
9 witness that proffered these demonstration systems had no
10 firsthand knowledge regarding the source code that was used for
11 the system, and he had no direct involvement in the preparation
12 of the systems for the demonstration, so he is not a competent
13 witness to be able to authenticate that these systems
14 accurately depict version 5.0 and version 6.0 systems.

15 And moreover, the defendant has admitted that these
16 are not the actual systems that were in use prior to August of
17 1994 because they include the source code, the operating
18 systems, the middle ware, and the hardware that postdates
19 August of 1994, and, therefore, there's no dispute that these
20 are not authentic or original systems. These systems were
21 re-created solely for purposes of this litigation.

22 THE COURT: At your request?

23 MS. ALBERT: Well, we didn't request that. We
24 requested to be able to inspect whatever systems they intended
25 to put on at trial once they said that they were relying on

1 their prior art systems for purposes of invalidity. We didn't
2 request that they create doctored-up systems using post-1994
3 technology. We requested to inspect the actual systems that
4 were allegedly in use prior to the date of the patents. That's
5 not what was produced.

6 THE COURT: All right.

7 MS. ALBERT: This, again, I think that in Lawson's
8 opposition they asserted that, well, we're not intending to put
9 this system on purely for purposes of invalidity. We also
10 intend that it go to all these other issues, but I think Your
11 Honor has already dealt with that, so I'm not going to raise
12 that again.

13 I think you've decided that these version 5.0 and
14 version 6.0 systems are not relevant for purposes of trying to
15 establish non-infringing alternatives, willfulness, lack of
16 intent, and those other issues that Lawson raised in its
17 opposition brief, so I'm not intending to go over those again.

18 THE COURT: Thank you.

19 MS. ALBERT: ePlus believes that any demonstration of
20 these systems would be highly prejudicial, and the jury will
21 likely believe that they are actual prior art systems that were
22 in public use prior to August of 1994 when they are not. And
23 this is --

24 THE COURT: We can deal with that by telling the jury
25 that they haven't. So if we do that, what value do they have

1 in the case then? So if I tell the jury, these really aren't
2 the prior art systems, so you can't consider them as prior art,
3 what happens? Why is that evidence in the case?

4 MS. ALBERT: Well, that's a good question. I would
5 think it wouldn't be admissible if it's not -- you know, it's
6 not even relevant because it's not the actual system, so under
7 Rule 402, it shouldn't come in. Under Rule 403, it shouldn't
8 come in because it's highly prejudicial, it's likely to mislead
9 the jury.

10 Notwithstanding a limiting instruction of the type,
11 you know, I think a picture is worth a thousand words, and if
12 they have in their mind that the system had some purported
13 functionality that's being demonstrated, they still might, you
14 know, make use of that, and that would be highly prejudicial to
15 ePlus because these are not the actual systems.

16 THE COURT: All right. Thank you.

17 MS. ALBERT: Thank you.

18 MR. McDONALD: Your Honor, I think we need access to
19 the system, put up some slides, please.

20 As I understood the Judge's earlier rulings today on
21 5.0 and 6.0, I think it is a pretty limited thing we're talking
22 about at this point. Those issues have been resolved in terms
23 of the other uses or nonuse of the version 5.0 and 6.0, but we
24 still have this one specific use that the Court has left open
25 with respect to invalidity, with respect to the searching for

1 matching items system.

2 And this demonstration does relate to that, and so
3 it's still something that's appropriate for presentation. So
4 what I've got up here on the screen at slide number 73 is the
5 notice of deposition and the inspection request from ePlus. I
6 think they indicated, you know, they were just asking us what
7 we were going to do at trial. That's not what this says.

8 It says, you are commanded to permit inspection of a
9 live fully functional version of Lawson Software release 6.0
10 operating on a fully functional computer system. That's what
11 they asked for, so that's what we did. We had this old system,
12 dusted it off, and got it loaded up on a fully functional
13 computer system so that they could see the function of it,
14 because that's what they asked for.

15 So that's the genesis of this, and they had a full
16 and fair opportunity to examine our witness on exactly what
17 they asked for. So this witness, if we go to slide 75, Mr.
18 Hvass was there in the '90s. As you can see here, he was
19 involved with presentation of this software, the version 5.0,
20 6.0 in the 1991 through '97 period including specifically these
21 procurement purchase order inventory requisition systems.

22 So this is somebody that had personal knowledge, had
23 been with Lawson a long time and actually operated those
24 systems, the software on those systems for customers.

25 And as you see on slide 76, the bottom line is he

1 testified that the functionality that he demonstrated for ePlus
2 at this deposition was the same functionality that the system
3 6.0 had in the 1993 time frame and the 5.0 had in the 1991 time
4 frame.

5 So this is the classic form of authentication where
6 if you drove a 1964 Mustang and somebody shows you a photo of
7 it, is that the car that you drove, you are allowed to say,
8 yes, that photo -- I recognize that as -- it looks like the car
9 I drove in 1964. Now, did you have to have taken the picture?
10 No, not necessarily. Does that have to be identical in every
11 respect? No. You're trying to show this is the same
12 functionality. And we should be allowed to do that.

13 They talk about these changes to the software, but
14 they didn't ask about the significance of any of those changes.
15 Many of those changes relate to things like software bug fixes
16 and patches that we all get every week or so from Microsoft
17 when your computer -- you have Outlook or Word, and at night
18 while we're all sleeping you get some little updates, but your
19 functionality doesn't change on the software. Those changes
20 are insignificant.

21 They've made no showing that any of them actually
22 altered the functionality that's relevant to the claims. Mr.
23 Hvass testified that the functionality that's of relevance that
24 he actually demonstrated is unchanged and was accurate for what
25 was done back in the '90s.

1 So there's no unfair prejudice here. They had a
2 chance to inspect it. If they want to talk about those other
3 software changes, they can, but the fact is that none of them
4 make a difference to the functionality that's relevant to the
5 searching for matching items claim.

6 We've given them the demo, they've had a chance to
7 cross-examine. It is relevant here because it's a way for the
8 jury to see what the system looked like, just like Mr. Weaver,
9 their infringement expert, has his own demo system of our
10 accused product that he's going to use and show a demo to the
11 jury of how our system works.

12 Is it an actual system installed at a customer? No.
13 It's a demo system he has where he puts some data on it. We
14 have a chance to cross-examine him on what he put on there, but
15 the bottom line is that is a useful thing for the jury to hear
16 about. That should go both ways. Just as they would like to
17 use a demo to prove infringement, we should be able to do at
18 least what's going to amount to a pretty limited demo given the
19 limited admissibility of this system on its functionality
20 relevant here to the searching for matching items claim.

21 THE COURT: How do you do that?

22 MR. McDONALD: Well, it would be through some screen
23 shots. I don't know that we're actually going to bring the
24 whole system in, but to do some screen shots, and, in fact, in
25 deposition, there were some screen shots demonstrated or

1 developed there. We might try to keep it a little more
2 streamlined by simply bringing in some screen shots, what is
3 going on in the functionality that's listed when you have those
4 menu of choices on your user screen and, okay, you click there
5 and you came to this next screen, okay, let's take a look at
6 the picture of the next screen.

7 That's kind of what I would envision being the most
8 efficient way to balance the idea of letting people see what's
9 going on here but not taking up too much time in the courtroom
10 with a lot of wires and cables and things like that.

11 THE COURT: All right.

12 MR. McDONALD: Thank you. I would also point out, we
13 did have a case cite that I think is relevant here at page 12
14 of our brief, the *Liquid Dynamics* case where the Federal
15 Circuit had affirmed that there was a model of a product
16 introduced. The expert admitted it wasn't identical but it was
17 in relevant respects suitable to what the expert's point was to
18 be made, and the Court said, that's fine. It doesn't have to
19 be identical to the prior product to serve the purpose of a
20 demonstration. Thank you.

21 MS. ALBERT: To address a couple points that Mr.
22 McDonald raised, he said that Mr. Hvass testified that this
23 demonstration system had the same functionality as the one that
24 existed prior to August of 1994, but how do we know that when
25 we don't have the actual system that existed prior to August of

1 1994 in order to compare the functionality of the demonstration
2 system that was re-created during the litigation to the system
3 that was actually in use prior to August of 1994?

4 And Mr. Hvass is not competent to testify that the
5 demonstration system is the same as the one used prior to 1994
6 when he doesn't even know how the demonstration system was
7 prepared. Moreover, under Supreme Court and Federal Circuit
8 precedent, these courts have long admonished against relying
9 upon uncorroborated testimony of interested parties regarding
10 alleged prior art. We had a number of cases cited in our reply
11 brief at pages four and five.

12 The Supreme Court case that's most famous is called
13 the *Barbed Wire Patent* case, and that related to some barbed
14 wire used for fencing that 20 witnesses, I think, came forward
15 and said, yes, I saw this same barbed wire out in this field,
16 you know, prior to the time of the patent, and the Supreme
17 Court said, no, that evidence cannot be used to corroborate the
18 alleged prior public use because witnesses whose memories are
19 prodded by the eagerness of interested parties to elicit
20 testimony favorable to themselves are not usually to be
21 depended upon for accurate information.

22 They can't rely --

23 THE COURT: We've sure come a long way since then,
24 haven't we?

25 MS. ALBERT: Pardon me?

1 THE COURT: Were the Federal Rules of Evidence even
2 in effect then? What date was that case?

3 MS. ALBERT: That was in 1892.

4 THE COURT: They didn't come in until 1938.

5 MS. ALBERT: There have been subsequent cases of the
6 Federal Circuit that have followed the ruling in that case.
7 The *Juicy Whip* case, *Finnegan* case, the *Woodland Trust* case
8 that we cited in our brief all, you know, rely upon that prior
9 Supreme Court precedent to keep this kind of uncorroborated
10 witness testimony out. There needs to be some contemporaneous
11 documentation of the prior public use, and a re-created
12 demonstration system using current technology does not
13 corroborate the functionality of the system that they're saying
14 existed prior to '94.

15 Also, one other point that Mr. McDonald raised was
16 this *Liquid Dynamics* case. That case is inapposite. That
17 involved computer-generated models that were relied upon by a
18 plaintiff's expert to evaluate whether the defendant's products
19 infringed the claims, and in that case, the defendant did not,
20 in fact, challenge the reliability of the models that were used
21 by the plaintiff's infringement expert.

22 In fact, the plaintiff's infringement expert's
23 studies were performed using the same software that the
24 defendant used for its own analysis, and the models -- the
25 Court found that the models were generated by an expert using

1 modeling methodology that has been recognized as reliable in
2 the scientific community.

3 This has no application to the issue of whether
4 Lawson should be permitted to introduce at trial demonstrations
5 of re-created artificial software systems and represent them as
6 alleged -- as alleged prior art or similar to alleged prior art
7 since, admittedly, the software and the hardware that was used
8 to create this demonstration system did not exist prior to
9 August of '94 and cannot be prior art.

10 THE COURT: All right.

11 MS. ALBERT: Thank you, Your Honor.

12 THE COURT: Let me hear the argument on the other.
13 Did you have something else?

14 MR. McDONALD: You are asking if I had one point I'd
15 like to make?

16 THE COURT: Yes.

17 MR. McDONALD: I have one point. With respect to the
18 this lack of corroboration, this is not relevant at all here to
19 the version 6.0 and 5.0. We've been talking about those
20 systems for a long time. There really was no documentation to
21 support the fact that they did exist back in the early to mid
22 '90s. We would have heard about it long before now.

23 The fact is, we produced user manuals and source
24 code. There's certainly documentation of the functionality
25 that ePlus has had for a long time, so this is an issue that

1 the only evidence of the system is this one person giving this
2 testimony. That's my only point.

3 THE COURT: All right.

4 MS. ALBERT: Nothing further.

5 THE COURT: I believe that the motion should be
6 granted. The key to allowing demonstrations of this sort is
7 the reliability, and the fellow doesn't really know how the
8 demo was put together, and so while he thinks it probably
9 matches what was in effect, it does not seem that he can truly
10 testify to that.

11 To the extent that it's relevant, I question whether
12 it's relevant given the date when the -- the date problem,
13 post-1994 problem, but even if it's relevant, its marginal
14 relevance is overcome by the potential to confuse the jury and
15 thereby create prejudice and delay in the case. That will be
16 the ruling on that.

17 Motion number -- what is it -- nine?

18 MS. STOLL-DeBELL: Nine.

19 THE COURT: Neither one of you want these
20 demonstrations in. Why did you take them? Why did you go
21 through all that? You wanted a trip to -- where was it --
22 South Jersey?

23 MS. STOLL-DeBELL: Well, I didn't go, but, sure,
24 that'd be great.

25 THE COURT: Only if you went to the shore.

1 MS. STOLL-DeBELL: So we're on slide 50, Your Honor,
2 of our presentation. I'll try and make this quick because it's
3 getting late, and I think everybody is a little tired here.

4 ePlus deposed four of Lawson's customers. One of
5 them was South Jersey Health Care, but there were three other
6 customers that were deposed that demonstrated the Lawson
7 Software that they purchased from Lawson and how it works, and
8 we're only seeking to preclude the South Jersey demonstration.

9 THE COURT: You're not precluding the other three?

10 MS. STOLL-DeBELL: We're not seeking -- no.

11 THE COURT: What's wrong with this one?

12 MS. STOLL-DeBELL: Well, to start off with, South
13 Jersey, they do have Lawson software, but they don't typically
14 use it to create electronic requisitions. They do paper
15 requisitions, and they use Lawson software to create electronic
16 purchase orders. That's their normal practice. You know, the
17 claims in this case all -- almost all of them require
18 electronic requisitions.

19 The second issue is, you know, there are multiple
20 different accused products in this case, one of which you've
21 heard about is this product called requisition self-service.
22 South Jersey did purchase that software from Lawson, but they
23 haven't actually started using it. They haven't gone live with
24 it. They haven't had training on it. They've got some test
25 data set up, and they're in the process of getting it up and

1 running, although the witness testified that she didn't even
2 know when it was going to go live.

3 So that's another problem with the demonstration, and
4 they asked her to do things and use the software in ways that
5 were, frankly, abnormal. They were asking her to generate
6 electronic requisitions. They're asking her --

7 THE COURT: Which they don't do.

8 MS. STOLL-DeBELL: They don't do, and she said, as
9 you can see -- actually, we pulled out some clips for you, Your
10 Honor. On slide 52 that's just two examples. She is telling
11 them, I'm doing the best I can, but this isn't working. She's
12 trying to put account numbers in, and the software is not
13 working. She did her best, but she didn't know what she was
14 doing because that's not what they normally do. It's just
15 prejudicial to show the jury this demonstration that's
16 artificial and inaccurate.

17 THE COURT: Let's see what they say about why they
18 want to do it.

19 MS. STOLL-DeBELL: I think what they say is, look, we
20 want to show what this software is capable of, and capable of
21 doing something is good enough to show infringement. Well,
22 they are asserting method claims, Your Honor. They are
23 asserting three method claims, and capability to do something
24 is not good enough to prove infringement of a method claim.

25 They have to prove that someone actually performed

1 all of the steps of that method, and another issue is
2 non-infringing uses of the software. We will put on evidence
3 that there are ways to use our software that are not
4 infringing, one of which is how South Jersey uses it.

5 THE COURT: Why isn't it relevant then for them to
6 rebut your contention that it can be used in other ways?

7 MS. STOLL-DeBELL: Because they have essentially
8 forced South Jersey us to use it in an infringing way or in a
9 way that they say is an infringing. We would say it's not.

10 THE COURT: Wait a minute, just a minute. Let's go
11 back. They don't get to put it on in their case in chief, but
12 you come on and you say, well, the way South Jersey does it is
13 a non-infringing use. Why can't they then put on evidence in
14 rebuttal to say, this is -- it can be used another way, i.e.,
15 in an infringing way?

16 MS. STOLL-DeBELL: Well, first of all, I think they
17 do --

18 THE COURT: And here's the proof of that.

19 MS. STOLL-DeBELL: I do think they intend to use it
20 in their case in chief.

21 THE COURT: They may intend to do it, but I might not
22 let them.

23 MS. STOLL-DeBELL: They have other evidence of what
24 this software is capable of. They don't need to use this
25 confusing and inaccurate demonstration. Like I said, they have

1 three other customers they deposed, and they walked through the
2 software and how it's used with those customers.

3 THE COURT: So it's cumulative. You're objecting to
4 this as cumulative and also as confusing, because in this
5 particular case -- because this customer doesn't use it in the
6 way that they wanted to have it demonstrated, it's a
7 bollixed-up operation and gives the wrong impression.

8 MS. STOLL-DeBELL: Absolutely. They don't need it.
9 They've got plenty of other evidence to show what the system
10 and what the software is capable of, and so there's just --
11 yeah, it's cumulative, it's prejudicial to Lawson. There's
12 just no reason to allow this in.

13 THE COURT: All right.

14 MS. STOLL-DeBELL: That was quick.

15 THE COURT: Who is going to do this from your side?
16 Are you going to get applauded for being quick?

17 MR. STRAPP: I think I'm the final word of the day,
18 so I better be; right?

19 THE COURT: I didn't say. She put you to the sword.

20 MR. STRAPP: Your Honor, I actually was in South
21 Jersey. I had the privilege and honor of traveling there to
22 take this deposition at South Jersey, and at the deposition I
23 asked, Ms. Cimino, who was the financial services manager of
24 South Jersey, if she would demonstrate for me how South Jersey
25 uses a software system that they purchased from Lawson.

1 Now, mind you, this is not a software system that
2 ePlus modified in any way or that Lawson or South Jersey
3 modified in any way. It's not a re-created system like the
4 Lawson legacy systems which were demonstrated. This is an
5 actual operating system that's in use at South Jersey.

6 THE COURT: But they don't use it the way that you
7 asked them to demonstrate it according to her.

8 MR. STRAPP: Well, actually --

9 THE COURT: Is that true or not true?

10 MR. STRAPP: I think the proof is in the testimony of
11 the witness here. If you could turn to slide 29, please.

12 Sorry, Your Honor, slide 30. My apologies.

13 THE COURT: 30?

14 MR. STRAPP: Yes. I asked the witness during this
15 demonstration to go through the system that's at South Jersey
16 and asked her whether it was capable of performing the claimed
17 functionality. I said, for example, "Could you create on the
18 system multiple purchase orders from a single requisition?"
19 That's one of the claim elements.

20 Ms. Cimino testified, "Yes, because the requisition
21 has the various items. Depending on who the manufacturer or
22 who the vendor for the order is, it gets split up on that
23 purchase order." Then going on, I also asked her, "Are you
24 familiar with the process of creating a requisition,"
25 electronic requisition.

1 Now, if you'll recall, Lawson's counsel testified
2 South Jersey doesn't do electronic requisition. Well, Ms.
3 Cimino testified at her deposition that she was somewhat
4 familiar with creating electronic requisitions using the Lawson
5 system, and I said, can you demonstrate that for me, and later
6 on in the testimony she said, yeah, "I could probably walk you
7 through that, yes." I said, "Okay, and what about through the
8 requisition module?" She said, "I could probably create a
9 requisition through the requisition module."

10 That was what she testified. Later on in the
11 demonstration -- I'll have the video here for you -- but she
12 actually did what she said she could do. She went on the
13 system, the real live Lawson system purchased by South Jersey,
14 she created a requisition.

15 Lawson seeks to keep out this testimony -- Lawson
16 concedes that the other three customers' demonstrations we can
17 provide to the jury. Now, why is it, you might ask, do they
18 want to take out this one? What's special about --

19 THE COURT: Because it's cumulative, she said, and
20 because it is not accurately representative of the usage and,
21 therefore, doesn't reflect the real-life situation, and it
22 contains errors in the way that it was used. I think I've got
23 it right. Is that right?

24 MS. STOLL-DeBELL: Yes, Your Honor.

25 MR. STRAPP: Let me address the two points, the

1 cumulative point and the point that it doesn't actually --
2 isn't usually performed this way.

3 On the cumulative point, South Jersey has an older
4 module that it's using right now. It's called a requisition
5 module, RQ module. That's one of the accused infringing
6 modules. The other customers that we demonstrated were using a
7 system called requisition self service. That is like a
8 souped-up newer version of the RQ module, and South Jersey is
9 the only customer who actually was able to demonstrate for us
10 how the RQ module, the older requisition module works.

11 So that's our only evidence that we can provide in
12 terms of a demonstration of how a customer is using a real live
13 RQ module, and that's why it's not cumulative to the other
14 three depositions.

15 Now, with respect --

16 THE COURT: Because it relates to a different module.

17 MR. STRAPP: Exactly. Now, with respect to the
18 contention that this is somehow misleading or this isn't the
19 way that it's typically used, you saw from the testimony Ms.
20 Cimino said, actually, you know, I do do it sometimes, I do
21 create electronic requisitions, and she went ahead and she
22 actually created a requisition, but I think what's important to
23 keep in mind here is the black letter law about capability of
24 infringement.

25 If I could direct Your Honor to, I think it's slide

1 27. At a conference call earlier in this case, this issue came
2 up, and you said, quote, during the conference call, "I,
3 frankly, don't understand how it is a defense to infringement
4 to say you sold Payne something, but Payne didn't use all of
5 it. If you sold it to me, that's an infringement, it seems to
6 me." And Your Honor's statement is in accord with the Federal
7 Circuit law which says, at the top of page 27, "An accused
8 device may be found to infringe if it is reasonably capable of
9 satisfying the claim limitations, even though it may also be
10 capable of non-infringing modes of operation."

11 The bottom of that slide, you'll see the expert
12 report of Lawson's expert who also agrees that capability is
13 the test of literal and direct infringement. So my point, Your
14 Honor, with respect to South Jersey and the demonstration, is
15 that there's no dispute here that the demonstration showed that
16 the RQ module, this older requisitions module, is capable of
17 creating electronic requisitions.

18 In fact, Ms. Cimino went on the system, it was
19 videotaped, we have the demonstration available, and she
20 created an electronic requisition and performed the claimed
21 functionality. The only question is whether or not that's
22 usually the way that South Jersey performs it, or it's not
23 usually, but under law --

24 THE COURT: She's going to testify it isn't the way
25 they usually use it.

1 MR. STRAPP: Right, and my point is under the Federal
2 Circuit law, it doesn't matter. If it's capable of infringing,
3 it's at least relevant to our claims for infringement. She
4 might say, it's not usually used that way. She might say with
5 respect to contributory infringement, I want to have a defense
6 that it's a substantial non-infringing use, and it can be used
7 in substantial non-infringing -- infringing ways, and she's
8 obviously permitted to say that.

9 We, on the other hand, are permitted to offer this
10 evidence to show that because it's capable of being used in
11 infringing ways, even if it can be used in non-infringing ways,
12 that's probative of our -- probative of our infringement claim.

13 One other point, Your Honor. If you could turn to
14 slide 28. Let's stop there for a second. This issue came up
15 in the *Ariba* and *SAP* cases, and the Court, in those cases,
16 agreed that the proper way to instruct the jury on this issue
17 about capability of infringement was to let the jury know that
18 the law is that it's not a defense to a claim of infringement
19 if the product is also reasonably capable of being used in a
20 manner that doesn't infringe. So long as the product is
21 capable of being used in an infringing manner, that is relevant
22 to a claim of infringement.

23 Next slide. A similar instruction was provided by
24 the Court in the *SAP* case. "A product or process accused of
25 infringing a patent infringes if it is reasonably capable of

1 satisfying the claim elements, even though it may also be
2 capable of operating in a way that does not infringe."

3 Lawson will surely argue and will put on evidence
4 that this South Jersey system was capable of being used in a
5 way that it claims doesn't infringe. That doesn't matter. If
6 it is reasonably capable of infringing, it's relevant to our
7 infringement claim.

8 Ms. Cimino demonstrated as much at her deposition,
9 and, therefore, the demonstration is relevant, it's probative,
10 and the last point is, Your Honor, it's not prejudicial,
11 because unlike the re-created legacy system, this is an actual
12 live Lawson system in use not modified by ePlus in any way that
13 South Jersey has purchased in an arm's-length transaction from
14 Lawson.

15 THE COURT: Thank you.

16 MS. STOLL-DeBELL: Let me first address this module
17 issue. They have got other evidence to show how the RQ module
18 actually works.

19 THE COURT: What is it?

20 MS. STOLL-DeBELL: Well, there's multiple different
21 things. They deposed Lawson. I think it was three days of
22 deposition of Lawson walking through, Lawson giving them demos.
23 We also produced to them a laptop with the software loaded,
24 both the RQ module and the RSS module.

25 Dr. Weaver had additional data loaded onto that

1 laptop, and he did his own demonstrations of the RQ module by
2 itself without RSS, and he's relying on those demonstrations.
3 He's got screen shots and videos of this demo that he's going
4 to play at trial. So as far as what the RQ module is capable
5 of, they've got --

6 THE COURT: In other words, this is not the only
7 evidence they have of what the RQ module is capable of doing;
8 right?

9 MS. STOLL-DeBELL: Yes.

10 THE COURT: Okay.

11 MS. STOLL-DeBELL: Yes, that's right. Capability,
12 what a system is capable of -- I said this already, I'm going
13 to say it again -- is not relevant to method claims, and it's
14 confusing and prejudicial to put this testimony on when they're
15 trying to prove a method claim. They're forcing her to perform
16 a step of the method that they don't normally do, and so, you
17 know, I don't take issue with this statement of law that for a
18 system claim, if it's capable of doing it, you know, that might
19 be good enough. We don't dispute that, but I am talking
20 about --

21 THE COURT: It doesn't apply as to a method claim.
22 Are they offering it to prove infringement of a method claim?

23 MS. STOLL-DeBELL: They don't distinguish it. They
24 just say claims, first of all, but second of all --

25 THE COURT: If all we had was a method claim, it

1 would not be probative; right?

2 MS. STOLL-DeBELL: No, it would not.

3 THE COURT: It couldn't come in because it wouldn't
4 be probative, would be not relevant; right?

5 MS. STOLL-DeBELL: I think that's right. And I think
6 already we've got 13 claims in this case, Your Honor, and it's
7 going to be hard enough -- it's hard enough for me to keep them
8 sorted out, let alone have the jury figure out what are
9 methods, what's means plus function, what is this relevant to,
10 what is it not relevant to. It's just -- it's cumulative, it's
11 not necessary, it's prejudicial, it's confusing, and it should
12 not be allowed in.

13 MR. STRAPP: Briefly, one more point, Your Honor.

14 THE COURT: All right. She can have the last word,
15 but let me tell you something. You stood there and you told me
16 that it was the only proof you had of how the RQ works, and
17 that was very effective. She came back and said, not so at
18 all. Now, one of you all have to be wrong about that. Who is
19 wrong; you or her?

20 MR. STRAPP: Let me explain, Your Honor. I was
21 mentioning in the context of the customer demonstrations, which
22 are the only actual evidence of use by customers --

23 THE COURT: Then the correct thing to have said is,
24 this is the only customer demonstration we have. Maybe you did
25 say that and I misunderstood because of the late hour --

1 MR. STRAPP: This is the only actual evidence we have
2 demonstrating the use of the RQ.

3 THE COURT: Excuse me. She said that Dr. Weaver has
4 evidence that he's going to use to demonstrate the use of the
5 RQ. Now, is he or isn't he?

6 MR. STRAPP: The system that Dr. Weaver has is a
7 demonstration system, not an actual live RQ system.

8 THE COURT: You are drawing a distinction not
9 relevant to answer the question that I asked. It's all right
10 if you want to say, this is the only customer demonstration.
11 Yes, we have Weaver, but Weaver is a put-together operation,
12 and we want the custom one, and the reason we want it is
13 because it shows what actually it's capable of.

14 Now, that's the way to handle that stuff, and I don't
15 want you to fall into the trap that some of these senior people
16 in this case have fallen into by not drawing the fine
17 distinctions that make a difference between making a
18 representation that's accurate and one that's not.

19 MR. STRAPP: Your Honor, that's the representation I
20 would like to make.

21 THE COURT: All right, I got it. Now, how about --

22 MR. STRAPP: The method claims?

23 THE COURT: -- method issue.

24 MR. STRAPP: Yes, Your Honor. I think Your Honor got
25 to the nub of the issue when you said, if there were only

1 method claims, maybe that would be a good argument. Well,
2 there aren't only method claims. There are also apparatus
3 claims.

4 In other words, because there are apparatus claims,
5 it seems that Lawson's counsel concedes that at least the fact
6 that it's capable of infringement at the South Jersey
7 demonstration, it could be relevant to infringement of those --

8 THE COURT: She says it's confusing. How do we deal
9 with that?

10 MR. STRAPP: That it's confusing?

11 THE COURT: Do we just tell the jury that that
12 evidence is pertinent as to the apparatus claim but not --

13 MR. STRAPP: I wanted to --

14 THE COURT: Is that how we --

15 MR. STRAPP: No. I also wanted to address the fact
16 that it's relevant to the method claims. First of all, there's
17 a Federal Circuit -- if you would put up slide 29, please.
18 There's a Federal Circuit case called *Hilgraeve Corporation*
19 which we cite in our papers. It's 265 F.3d 1336, and that case
20 said that the sale of a device that is capable of
21 non-infringing modes of operation may induce infringement of a
22 method claim.

23 That's the statement of the Federal Circuit. In
24 other words, even if this -- even if this product is capable of
25 being used in a non-infringing way, it's capable -- it's

1 relevant to infringement of a method claim.

2 THE COURT: I can deal with that later, can't I? She
3 doesn't agree that that's the law.

4 MR. STRAPP: Let me tell you what this Court has said
5 was the law in the *ePlus v. SAP* case when it instructed the
6 jury. If you turn to slide 29, please.

7 THE COURT: Is this one of those cases where --

8 MR. STRAPP: This is a jury instruction that the
9 Eastern District of Virginia issued in the prior case
10 involving --

11 THE COURT: I know, but you all pick and choose from
12 the *SAP* case. Is this something you like about it?

13 MR. STRAPP: Well, if I could just direct you to the
14 first sentence of this jury instruction, it says, "A product or
15 process accused of infringing a patent infringes if it is
16 reasonably capable of satisfying the claim elements."

17 Now "product" here is code word for apparatus.
18 "Process" is code word for method claim. In other words, if
19 something is reasonably capable of infringing, it's relevant
20 both to your apparatus issue, and it's relevant to your method
21 claims. We argue here, Your Honor, and it seems the law
22 supports us, the Court has found so in *SAP*, that because South
23 Jersey's system is capable of infringing, it's relevant to both
24 our apparatus claims and our infringement claims on the method
25 claims as well.

1 THE COURT: When we turn on the videotape of her
2 deposition -- that's what's going to happen; right?

3 MR. STRAPP: Right.

4 THE COURT: If you have your way. Are we going to
5 see Katzenjammer kids -- you don't even know what that is. Let
6 me start again. Is this going to be a joke because she
7 doesn't -- the lady doesn't know how to do it and she makes
8 mistakes and everything?

9 MR. STRAPP: Your Honor, it would not be in our
10 interest to put on a demonstration that's a joke or shows a
11 woman not being able to use the system --

12 THE COURT: It would be if it's the only thing you've
13 got.

14 MR. STRAPP: Your Honor, respectfully, I was at that
15 deposition, and I would like to believe that it wasn't a joke,
16 and I think it wasn't. In fact, I think that's the reason why
17 Lawson is fighting to exclude it, because it's evidence that
18 shows that the RQ product operates as it's supposed to operate
19 in an infringing manner.

20 THE COURT: All right, you have the last word if you
21 want it.

22 MS. STOLL-DeBELL: I think I'm done, Your Honor.

23 THE COURT: Okay, I have to reserve for further study
24 the extent to which this evidence would be admissible on the
25 capability question as to system and apparatus versus method,

1 but at least it is irrelevant as to the method -- I mean as to
2 the apparatus even in the acknowledgment of the defendant, and
3 it is -- it is not cumulative evidence, it being the only
4 actual system that shows the RQ in operation in the hands of
5 the customer, and the prejudicial aspect, I think, that would
6 arise from the missteps that the woman made can be cured by
7 just letting the jury see the videotape and see how it works.
8 But I'm going to instruct you both to review it carefully, and
9 if what we've got is a comedy of errors, it's not going to come
10 in because that's wasteful of the jury's time. So the motion
11 will be provisionally denied.

12 That leaves me with a few things to do; is that
13 right? We don't have any more motions to argue; is that right?

14 MR. McDONALD: That's correct, Your Honor. Your
15 Honor, I wonder if I would have leave because I have a
16 seven o'clock flight.

17 THE COURT: Hit the road.

18 MR. McDONALD: Thank you.

19 THE COURT: You are cutting it close as it is.

20 MR. McDONALD: I agree. Thank you, Your Honor.

21 THE COURT: All right, Mr. McDonald is gone, but
22 we're going to go. You all have a time to talk with Judge
23 Dohnal?

24 MR. ROBERTSON: August 19th.

25 MR. CARR: Correct, Your Honor.

1 THE COURT: August 19th. Both of you have some
2 problems in the case, folks, problems that warrant a serious
3 look at whether you're going to settle it or not, and I will
4 say -- I wasn't saying this for settlement purposes. I
5 genuinely believe that your damages case takes a hit for the
6 reasons that I expressed, and I wasn't trying to communicate
7 that for purposes of inviting you all to settle, but whereas
8 here you have liability problems, and you might make sure you
9 communicate this to Mr. McDonald, and you do, I think, have
10 some liability problems, and they have damage problems.

11 That usually provides a reasonably efficacious way in
12 which to try to reach an accommodation that businesspeople can
13 live with. All right? Thank you. We will be in adjournment.

14

15 (End of proceedings.)

16

17

18 I certify that the foregoing is a correct transcript
19 from the record of proceedings in the above-entitled matter.

20

21

22 /s/
23 P. E. Peterson, RPR

24

25

Date